# 92-883

No.

In The

# Supreme Court of the United States

October Term, 1992

CHARLES E. BERRY,

*Petitioner,*

*vs.*

A. DOE, J. DOE, HOSANA A. HUCK, MARIANNE McKINLEY, REBECCA PRICE, and NANCY CRAWFORD and MELISSA WALKER as Representative Parties on Behalf of a Definable Class,

*Respondents.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. Do allegations by an African-American of violations of his rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Ku Klux Klan Act, 42 U.S.C. § 1985(3), invoke laws providing for equal civil rights for purposes of removal under the Civil Rights Removal Act, 28 U.S.C. § 1443(1)?

II. Does a pattern of racially-motivated actions which amount to the economic lynching of an African-American during the course of a bad faith criminal prosecution interrelated with multiple punitive damages cases form a basis for invocation of the Civil Rights Removal Act, 28 U.S.C. § 1443(1)?

## LIST OF ALL PARTIES

Charles E. Berry

Berry Communications Systems, Inc.

Francine Gillium

Theresa Yvonne Schmitt

"A. Doe"

"J. Doe"

Rebecca Price

Hosana Huck

Marianne McKinley

Sharissa Kistner

Shannon Meeker

Nancy Crawford

Melissa Walker

Ann Feagan

Janice Butler

Sandra Jo Kessler

Bridgett Pogrelis

Bonnie Norton

Lucille Salyers

Rebecca Heil

Freedom Meeker

Tammy Lipp

Shirley Riker

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Petitioner Charles E. Berry prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit which affirmed orders granting motions to remand in five civil damages lawsuits removed to federal district court pursuant to the Civil Rights Removal Act, 28 U.S.C. § 1443(1).

## OPINIONS BELOW

The Order of the Eighth Circuit denying the petition for *en banc* disposition appears at Appendix A, *infra.* The *per curiam* Opinion of the Eighth Circuit affirming the remand of the five punitive damages cases from the St. Charles County, Missouri Circuit Court consolidated for appeal, appears at Appendix B, *infra.* The Orders and Opinions of the United States District Court for the Eastern District of Missouri in each of the removed cases appear at Appendix C, *infra.*

## STATEMENT OF JURISDICTION

The Opinion of the Eighth Circuit was filed on June 30, 1992. The Petition for *en banc* disposition was overruled by the Eighth Circuit on August 20, 1992. This Petition for Certiorari was filed with the Court no later than ninety days from the date of denial of the Petition for *en banc* disposition by the Eighth Circuit. Jurisdiction over this Petition is conferred on the Court by 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*See* Appendix D, *infra,* for applicable portions of Section One of the Fourteenth Amendment to the United States Constitution, 28 U.S.C. § 1443(1), and 42 U.S.C. § 1985(3).

## STATEMENT OF THE CASE

Before the Court is this clearest instance imaginable of a racially-motivated misuse of state civil judicial procedures and criminal prosecuting authority by private litigants and their attorneys working in concert with state actors. The ultimate goal of their combination and conspiracy is to achieve the financial destruction tantamount to an economic lynching of a uniquely American cultural icon. Petitioner can be saved from that lynching only if he is afforded the protections of a federal forum in which to defend himself against the racially charged tort claims hanging over his future.

Petitioner, popularly known as Chuck Berry, is an African-American singer of world renown. He removed to the district court five punitive damages/personal injury cases comprising 800-plus claims of alleged invasion of privacy (and one "interpleader" suit) in which his constitutional rights were persistently trampled. Petitioner alleged in his Notices of Removal (which incorporated his federal civil rights complaint) that the combined forces of St. Charles County, Missouri prosecuting and state court authorities acting with civil litigants and their lawyers deprived him of his right to equal protection of the laws as guaranteed by the Fourteenth Amendment and the Ku Klux Klan Act.

Their illegal ends to deny Berry's rights were achieved to a distressing degree by having Berry's estate raided in violation of the Fourth and Fourteenth Amendments on bogus drug-trafficking charges; by unconstitutionally charging him with three spurious counts on felony "child abuse"; by holding televised police and prosecutorial press conferences which defamed Berry and tainted potential jurors and the court system through false accusations of drug trafficking and child pornography; and by prosecuting civil suits in a forum which systematically made fundamentally unfair rulings against Berry while state court judges refused to equally

apply the laws for no plausible reason other than the race of Petitioner and his flouting of racial taboos.

The personal injury claims almost exclusively seek awards of punitive damages against Petitioners by jurors drawn from the overwhelmingly white jury pool in St. Charles County. Depositions of most "representative" plaintiffs in the purported "class action" removed, *Crawford v. Berry,* revealed virtually no actual damages, — *i.e.*, no losses of wages, no expenditures for medical treatment of the alleged injuries, and no demonstrable traumas.

The hundreds of plaintiffs in the removed cases are all Caucasian women who allege they were videotaped by Petitioner while using bathroom facilities. They claim the videotaping took place at Southern Aire Restaurant and Petitioner's estate known as "Berry Park", both located in St. Charles County, Missouri. Petitioner Berry denies all responsibility and liability for the videotaping, as does his Caucasian business manager, Francine Gillium, who joined in the removals.

Berry removed all the St. Charles County civil cases to the district court under the Civil Rights Removal Statute, 28 U.S.C. § 1443(1). The gist of his removal allegations was that the personal injury, punitive damages cases were rigged against him because of his race and relative wealth. After briefing of motions to remand filed by the tort claimants, but with no hearing to permit Berry to put on evidence proving his constitutional claims, the district court remanded all six cases solely upon the pleadings. Thus, this Petition presents the novel question of law whether a "racially-motivated economic lynching" in the civil and criminal proceedings against Petitioner in St. Charles County in violation of 42 U.S.C. § 1985(3) and the Equal Protection Clause suffice to state a basis for removal under § 1443(1).

The pattern of racially discriminatory unfair conduct against Petitioner Berry began in 1989 with the actions of one Vincent Huck.[1] In his role as a part-time informer, Huck participated in and directed several illegal searches of private, locked buildings or residences at Berry Park tantamount to officially-sanctioned burglary. Berry alleged on removal that, in committing those burglaries, Mr. Huck acted in conspiracy with and under the direction of attorneys in the removed punitive damages cases against Berry and under a *de facto* grant of immunity from prosecution by the then-St. Charles County Prosecuting Attorney and other St. Charles County law enforcement officials.

Vincent Huck shared some of the fruits of these unauthorized seizures with the attorneys for personal injury claimants. Those attorneys therefore embarked on a concerted plan to deprive Berry of the equal protection of the laws through coordinated efforts to enrich themselves at his expense by inflaming racial animus toward him.

During said burglaries Huck also "seized" under color of state law, while acting for then-prosecutor Hannah and St. Charles police officials, certain personal photographs of Berry, as well as videotape cassettes which the Prosecuting Attorney and police authorities permitted Huck to convert to his own use and to share with the personal injury claimants' attorneys. Huck and at least one civil damages class action (*Crawford v. Berry*) attorney, Ronald Boggs (another former St. Charles County Prosecuting Attorney), then entered into illicit negotiations with video distributors,

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1. A good portion of the factual account of the events leading up to removal to federal court of the five punitive damages cases and the interpleader case are recited in the Notices of Removal which incorporated by reference the allegations appearing in the original civil rights Complaint styled *Berry, et al. v. Boggs, et al.*, No. 91-1586(C)-2, pending in the Eastern District of Missouri. The remainder is drawn from discovery conducted in that case.

writers and publishers in Western Europe and throughout the United States in an effort to capitalize upon Mr. Berry's celebrity as an entertainer.

Plaintiffs' counsel in *Huck v. Berry,* removed to and remanded from federal court, meanwhile conspired with Huck and Huck's wife Hosana (the first personal injury plaintiff) and Boggs to deprive Petitioner of the equal protection of the laws by threatening Berry with filing lawsuits and seeking his criminal prosecution on racially inflammatory spurious charges of child pornography if Berry did not pay $10 million as ostensible "damages".

Acting in concert to deny Petitioner the equal protection of the laws, and to damage him in his person and property, certain attorneys with Vincent Huck as their "legal investigators" and Hosana Huck agreed to capitalize upon Berry's racial minority status with lurid allegations of inter-racial "peeping" and other inter-racial sexual titillation by filing with great fanfare *Hosana Huck, et al. v. Berry* when Petitioner rejected the blackmail attempts.

In furtherance of their conspiracy to assist the personal injury claimants against Mr. Berry, then-Prosecuting Attorney Hannah applied on June 23, 1990 for a search warrant to search Mr. Berry's living quarters, offices, studio and other structures located at Berry Park. Its basis was an outrageously false affidavit, lacking in probable cause, sworn by William G. Bowman, a Sheriff's Deputy in St. Charles County and a defendant in Petitioner's civil rights complaint. His affidavit detailed the incredible claims of supposedly "reliable, confidential informants" — at least two of whom were none other than Vincent Huck, with his readily apparent motives to disparage Mr. Berry.

That same day the St. Charles County anti-drug unit and

Sheriff "raided" the Berry Park estate without Mr. Berry's knowledge or consent. In the search the authorities caused extensive damage to the walls of certain structures at Berry Park. The authorities seized various items of Petitioner's personal property including several books and currency totalling $123,000, of which $122,501 was eventually returned and $499 disappeared. The St. Charles County authorities found absolutely no cocaine on Mr. Berry's property. Nor did they find any evidence that he had ever engaged in cocaine trafficking.

On June 27, 1990 the St. Peters, Missouri police chief (in St. Charles County) and chairman of the anti-drug unit disseminated to the press details of said "raid", despite the fact that no charges had been filed against Petitioner up to that time. He falsely advised the press that the authorities had found a "supply of narcotics" and that so-called "drug records" were seized from Mr. Berry's property. His accusations made specific reference to claims (already known to be false) that Petitioner was involved in trafficking "multi-kilogram quantities of cocaine". That press conference was held solely for the purpose of inflaming the population and judiciary of St. Charles County against Petitioner.

On the very day of the police chief's press conference, the *Crawford* class action case was filed amid great publicity in the St. Charles County Circuit Court by unnamed "representative parties" as plaintiffs against Mr. Berry. The day that case was filed, the plaintiffs obtained *ex parte* an order sealing their identities, and Petitioner did not learn who were his accusers until nearly one year later. Petitioner alleged on removal that such procedure violated his rights to equal protection and due process since he had no knowledge of his accusers or the nature of their claims.

The day after the class action suit was filed then-Prosecuting Attorney Hannah called a press conference at his office in which he gave an "account" of the "raid" on Mr. Berry's estate. Still, no

criminal charges had been filed. Hannah related that the authorities were "looking for" cocaine on Mr. Berry's property: "Cocaine was of course one of the major items we were looking for, and yes, as in many times when you conduct a search, you don't find everything that is listed in your affidavit". Hannah thus fostered the false impression among the local voting public and the potential jury pool that Petitioner dealt in and kept cocaine, but had successfully eluded the search. Hannah then released to the press the same bogus search warrant affidavit already known to be baseless. By another press report of the Hannah news conference, St. Charles County authorities claimed they had seized "pornographic tapes" which allegedly displayed underaged women "using" the restroom. On removal Petitioner alleged that these statements also deprived him of equal protection of the laws in violation of the Fourteenth Amendment and § 1985(3).

On July 19, 1990 Hannah filed criminal charges against Mr. Berry, three felony counts of "child abuse" of white minor children and one felony count for alleged possession of over 35 grams of marijuana. The charges were filed only after repeated consultations among Hannah and the civil rights action defendants, who had significant racial, financial and political motives and interests in initiating and continuing that baseless prosecution of petitioner Berry. The "child abuse" charges made pursuant to Mo. Rev. Stat. § 568.060 asserted tht Berry was guilty of photographing or filming white children less than seventeen years old "engaging in a prohibited sexual act . . .". Petitioner alleged these charges violated his First Amendment freedoms and right to equal protection.

During the course of the criminal prosecution, a St. Charles County Assistant Prosecuting Attorney charged with building a criminal case against Berry, said to Sheriff's deputies about Mr. Berry, "One way or another we are going to get that nigger!". Petitioner alleged on removal that this statement by the lead

prosecutor on his case made manifest that his criminal prosecution was not undertaken in good faith but was rather motivated by racial bias, and that bad faith was borne out by the authorities' actions in pursuing those charges. The felony child abuse charges were dropped by the St. Charles County Prosecuting Attorney in the state court after Petitioner Berry filed his first federal civil rights action (against Prosecutor Hannah only) since dismissed voluntarily.

The first civil case filed in St. Charles County and later removed to federal court was *Hosana Huck, et al. v. Charles E. Berry, et al.* Petitioner filed a motion to dismiss the claims of the plaintiffs on the basis of workers' compensation preemption. Under Missouri law, that was the exclusive remedy available to the women allegedly videotaped using the restrooms in the course of their employment at the Southern Aire restaurant. That crucial motion, which should have barred substantially all the punitive and other damages claims against Berry, was denied by a St. Charles County Circuit Court judge who then had maintained a 17-year romantic relationship with a plaintiff in the related "class-action" case against Petitioner, *Crawford v. Berry.* Petitioner alleged that violated his right to a fair tribunal and to equal protection of the laws.

In *Huck*, Petitioner later sought to join as a party defendant on his counter-claim for invasion of privacy and conversion of personal property the attorney for Hosana Huck, Thomas Jones. Without precedent in Missouri law Circuit Judge Donald Dalton ruled that, as a condition precedent to joining Jones, Mr. Berry must first present a *prima facie* case showing liability at an evidentiary hearing. Petitioner claimed on removal that procedure violated his right to equal protection of the laws. At the time of that ruling, Judge Donald Dalton was required by Rule 51.07 Mo. R. Civ. P. to disqualify himself from any cases against Mr. Berry since he had a blood relation to one of the attorneys for some of the "class action" plaintiffs.

Because of that onerous condtion, Mr. Berry withdrew his motion to join Jones as a counter-claim defendant and filed a separate lawsuit against him and Hosana Huck. Circuit Judge William Lohmar then dismissed Berry's claims against Jones for alleged failure to answer interrogatories sufficiently, when Berry had answered the interrogatories by referring to his testimony given in the course of a two-day deposition taken shortly before. Judge Lohmar denied reconsideration.

Circuit Judge Lohmar then denied Mr. Berry's motion to disqualify him for "bias and prejudice" arising from Judge Lohmar's role in the criminal case against Mr. Berry, as well as that Judge's denial of Mr. Berry's motion to reconsider his sanction order, and the order imposing that sanction. Judge Lohmar had chosen to believe the Huck-Bowman affidavit and had signed the warrant to search Berry Park extensively for cocaine (of course, none was found) at the time of the "raid". A few months later, however, in the *Crawford* class action suit – directly related to the *Berry v. Huck and Jones* case – Judge Lohmar recognized that he was required to disqualify himself for "cause".

On March 8, 1991, Circuit Judge Donald Dalton imposed a large monetary sanction against Mr. Berry and his attorney because of defendant Huck's "inability" to take the deposition of one Theresa Y. Schmitt in *Berry v. Huck and Jones*. At her deposition Ms. Schmitt (then not represented by counsel) asserted her Fifth Amendment privilege and refused to answer various questions about the videotapes in question. Neither Petitioner nor his counsel played any role in Ms. Schmitt's assertion of Fifth Amendment rights. That sanction also was imposed by a judge who should have disqualified himself from ruling in the case because of his blood relationship to some of the attorneys suing Petitioner.

In *Berry v. Huck and Jones*, Judge Lohmar granted, *ex parte*, defendant Jones' motion to certify as "final and appealable" the

"sanction" dismissing Jones from the litigation. Mr. Berry was not provided notice of that order. This was alleged on removal to be a clear violation of Mr. Berry's rights which deprived him of his right to file an appeal because appeal would be untimely under Missouri law. Counsel for Petitioner did not discover the existence of the order dated April 3, 1991 (handwritten on a copy of Jones' motion to certify, and without any indication that it was mailed to counsel) until July 15, 1991 while reviewing the court file in St. Charles County in preparation for filing the pending federal civil rights action of *Berry v. Boggs, et al.*

On April 19, 1991 in the *Crawford* "class-action", Judge David Dalton ordered that a $5,000 monetary sanction be imposed against Petitioner and his counsel because Mr. Berry "failed" to appear for a unilaterally-scheduled video deposition. But Mr. Berry had filed a motion for protective order before the scheduled time for the deposition, in compliance with the Missouri Rules of Civil Procedure, because of an ongoing, disfiguring course of oral surgery. Just seven days after he ordered that sanction, Judge David Dalton recognized that he, too, should have disqualified himself because of his blood relationship with an attorney for some of the class action plaintiffs. However, the judge refused to reconsider his order imposing sanctions even though his order should not have been entered and was void.

Ten months after filing the case the attorney for the *Crawford* "class action" litigants, their attorney Ronald Boggs for the first time provided notice to Petitioner's attorneys that some of the putative class members were represented by a lawyer related by blood to two of the four St. Charles County Circuit Judges, David and Donald Dalton. Also on that date Mr. Boggs for the first time provided (after repeated requests for same) names of some of the putative class members whom he intended to call to testify at the class certification hearing to be held just seven days later. Petitioner alleged that this was an obvious attempt at an

unconstitutional procedure (failure to provide Mr. Berry with timely notice of the nature of the claims against him) which was avoided only when Circuit Judge Fred Rush disqualified himself because of his previously concealed personal relationship (with one of the putative class members). Later, in a deposition taken in the civil rights case, *Berry v. Boggs, et al.*, Petitioner learned that Judge Rush had viewed at least one of the "bathroom" videotapes at his home with his paramour and discussed her case with her while he was considering on the critical motion in all these cases, that of the workers' compensation preemption defense.

On May 17, 1991 attorney Boggs called up for hearing before Circuit Judge Donald Dalton the class action plaintiffs' motion for "discovery" sanctions in the amount of $4,000. In light of the disqualification of Judge David Dalton, counsel for Mr. Berry moved that his brother be disqualified for cause. However, Judge Donald Dalton denied Berry's motion. The motion for sanctions was not heard that day only because the judge allowed co-defendant Schmitt, a white woman who was Berry's former paramour, to disqualify him without showing any "cause" although Missouri's civil rules did not permit such. Berry alleged on removal that his equal protection rights were thereby denied.

On May 7, 1990 attorney Jones and two of his clients filed in St. Charles County against Petitioner an "interpleader" action seeking a declaration by a St. Charles County Circuit Judge that Mr. Berry was the "owner" of the so-called "bathroom videotapes". The interpleader action alleged that the tapes were evidence in the other five removed cases, all of which make identical invasion of privacy claims and seek punitive damages. On removal, Berry alleged that interpleader was a vehicle to unlawfully circumvent his right to a jury trial on a fact issue crucial to imposing liability in the five removed cases: Was he the owner/ producer of the "bathroom" videotapes?

The "interpleader" later was dismissed after one of the interpleader plaintiffs filed a memorandum to the clerk dismissing her claim. The dismissal was docketed by the clerk "on parties stipulation" and "at defendants' costs". Mr. Berry, however, did not "stipulate" to anything in the interpleader case. He never received any notice from the St. Charles County Court of said dismissal or that he was supposedly liable for "costs". The dismissal was not uncovered by his counsel until the court's files were reviewed in July 1991 as counsel prepared for the filing of his civil rights case, *Berry v. Boggs, et al.*, currently pending for trial. On removal, Berry alleged this typified the unequal treatment of him in St. Charles County, a pervasive inequality which had no explanation other than its motivation by racial bias.

Although his "interpleader" had been dismissed at the time, attorney Jones sought "reopening" of the case and a ruling on the merits. Berry filed his Notice of Removal in the interpleader case within five days after he received notice of plaintiffs' attempt to reopen and obtain a final ruling.

The five punitive damages and one interpleader cases were removed pursuant to the Civil Rights Removal Act, 28 U.S.C § 1443(1). The first Notice of Removal was filed the day after Mr. Berry filed his federal civil rights complaint styled *Berry v. Boggs, et al.*, the others were filed in days thereafter. The six removed cases ended up in front of six different district judges. The principal opinion granting remand, authored by Chief District Judge Filippine, was adopted by the other judges. Appeal to the Eighth Circuit was taken under 28 U.S.C. § 1447(d). The Eighth Circuit's *per curiam* opinion affirming remand of all six cases essentially adopted the reasoning of Chief District Judge Filippine. Namely, the Ku Klux Klan Act was held not to be a proper basis for removal even when invoked against a "racially motivated economic lynching". The opinions avoided the issue of removability under the Equal Protection Clause.

## REASONS FOR GRANTING THE WRIT

### I.

### THE LOWER COURTS ERRED IN RULING AS A MATTER OF LAW THAT CHUCK BERRY, A PROMINENT BLACK ENTERTAINER, FAILED TO INVOKE ON REMOVAL A LAW PROVIDING FOR EQUAL CIVIL RIGHTS WHEN HE ALLEGED IN ALL NOTICES OF REMOVAL VIOLATIONS OF HIS RIGHT TO EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT AND PROTECTED BY THE KU KLUX KLAN ACT.

This Petition presents a significant issue of first impression for the Court: Is 42 U.S.C. § 1985(3) a law providing for specific civil rights in terms of racial equality? The district court too glibly assumed it was not.

The district court granted remand without holding an evidentiary hearing on the sufficiency of Petitioner's civil rights removals. Therefore the allegations in the notices of removal and accompanying papers must be taken as true. *North Carolina v. Grant*, 452 F.2d 780, 782 (4th Cir. 1972) (§ 1443 removal case). In a § 1443 case where removal was upheld, the Second Circuit stated that a petition to remove "shall be . . . construed to do substantial justice' ". *White v. Wellington*, 627 F.2d 582, 587 (1980). *See also Calhoun v. City of Meridian*, 355 F.2d 209, 212 (5th Cir. 1966). The Eighth Circuit's *per curiam* opinion here conflicts with these decisions of the Second, Fourth and Fifth Circuits on the proper construction to be given a § 1443 removal. The Eighth Circuit did not even cite to the rules on construction, nor did it address the substantive issues raised by Petitioner's allegations under the Ku Klux Klan Act and the Equal Protection Clause.

Pleadings in a § 1443 removal must satisfy a two-pronged test. First, the right allegedly denied the removal petitioner must appear to arise under a federal law providing for specific civil rights stated in terms of racial equality. *Georgia v. Rachel,* 384 U.S. 780, 788 (1966). Second, a removing defendant must show that he/she "is denied or cannot enforce" the specified federal rights in the state courts. *Id.*

**A. Allegations In The Notices Of Removal Of Violations Of Equal Protection Of The Laws Guaranteed By The Fourteenth Amendment Justify Removal.**

In holding that Petitioner failed to allege in his Notice of Removal a violation of any law providing for civil rights in terms of racial equality, the lower courts focused only on his allegations of violations of 42 U.S.C. § 1983, while ignoring Berry's pleading under the Equal Protection Clause of the Fourteenth Amendment. But the district court's recitation of Berry's removal allegations made plain that Petitioner pleaded Equal Protection violations:

> Defendant Berry contends that removal is proper because he "has been and will be denied his equal civil rights because of the racially-motivated criminal prosecution which gave rise to and was in conjunction with the procedurally unconstitutional state civil actions which have been a *race oriented economic lynching*." . . . Defendant Berry alleges that judicial and prosecutorial personnel in St. Charles County, Missouri, are prejudiced against him and have engaged in a variety of acts which that Defendant contends deprive him of his "*rights to equal protection of the laws*, . . . as generally guaranteed by the Fifth, Seventh, Eighth, and *Fourteenth*

> Amendments to the Constitution and specifically protected by 42 U.S.C. §§ 1983, 1985 and 28 U.S.C. § 1443."

(App. C) (emphasis added). This Court has held that the Equal Protection Clause of the Fourteenth Amendment is a "law providing equal rights" for purposes of § 1443 removal, *Strauder v. West Virginia,* 100 U.S. 303, 311-12 (1879). Certiorari should issue, *inter alia,* to review the Eighth Circuit's failure to follow *Strauder.*

It is undebatable that a fundamental purpose of the Equal Protection Clause is to combat race discrimination. *Palmore v. Sidoti,* 466 U.S. 429, 432 (1984). In *Rachel,* this Court held that those removing defendants' reliance upon the Civil Rights Act of 1964 was sufficient to invoke § 1443(1) since that law confers a "specific right of racial equality". 384 U.S. at 792. Under the *Rachel* test, allegations that the right to equal protection of the laws as combatting racial discrimination provide a proper basis for a § 1443(1) removal.

**B. Allegations In The Notice Of Removal Of Violations Of 42 U.S.C. § 1985(3) Were Sufficient To Justify Removal.**

The Eighth Circuit affirmed without analysis the district court's finding that the § 1985(3) does not provide for specific civil rights stated in terms of racial equality (App. B and C, citing *Rachel,* 384 U.S. at 792). Careful review reveals that nowhere did the *Rachel* Court hold that § 1985 does not protect the right to racial equality. Petitioners find no decision by the Court on the question whether allegations that § 1985(3) rights were violated by state court proceedings is a sufficient basis for a § 1443(1) removal of a civil case. *Rachel*'s dictum that violations of 42 U.S.C. § 1983 would not properly invoke § 1443(1) does not extrapolate into a thoughtful rule for decision on removals under § 1985(3). The

plain language of §§ 1983 and 1985(3) show they are fundamentally different. Section 1983 broadly provides any person a cause of action for "deprivation of any rights . . . secured by the Constitution and laws . . .".

In contrast § 1985(3) specifically protects African-Americans against racially-motivated conspiracies. Indeed, the Court has ruled that § 1985, termed the Ku Klux Klan Act, was directed to eradicating racial bias fomented through private or official conspiracies. *United Brotherhood of C. & J. v. Scott*, 463 U.S. 825, 836 (1983) held: "The predominant purpose of § 1985(3) was to combat the prevalent animus against Negros and their supporters". *See also id.* at 837, holding the "central concern" of § 1985 was "combating the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, *Fourteenth*, and Fifteenth Amendments" (emphasis added).

The plain language of § 1985 makes clear that the statute is analogous to the Equal Protection Clause of the Fourteenth Amendment, but with the added virtue that its sweep extends to private conspiracies. As such § 1985 itself is a repository of rights provided to Black citizens — the "equal protection" and "equal privileges and immunities" rights to be free from racially based conspiracies. *See United Brotherhood*, 463 U.S. at 840-41 (Blackmun, J., dissenting with three justices).

To state a claim for violation of § 1985 a complaint "must" aver "some racial, or perhaps class-based, invidiously discriminatory animus behind the conspirators' action". *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). In *Griffin*, the Court found the following allegations sufficient to state a violation of § 1985: (a) a conspiracy to assault two Blacks, (b) of which the " 'purpose was to prevent [the] plaintiffs and other Negro-Americans, through . . . force, violence, and intimidation, from seeking the equal protection of the laws and from enjoying the equal rights,

privileges and immunities of citizens under the laws of the United States and the State of Mississippi,' including a long list of enumerated rights such as free speach . . .". *Id.* at 103.

Petitioner's allegations of § 1985 violations in these removals closely parallel those in *Griffin*. Mr. Berry alleged that the St. Charles County police, court and prosecutorial officials as well as private lawyers (one a former elected prosecutor in that county) and their clients conspired to deprive him of his § 1985 right to be free from racially motivated conspiracies to deny him equal protection of the laws. The conspiracy was made manifest, in part, through a racially-motivated unconstitutional criminal prosecution for "child abuse" of white minors arising from videotapes of persons using a public bathroom allegedly taken by Petitioner. Berry alleged that in the course of the criminal prosectution an assistant St. Charles County prosecutor stated: "One way or another we're going to get that nigger!".

The criminal prosecution followed closely on the heels of the June 1990 drug "raid" on Berry's estate. The raid revealed nothing, but was publicized conspiciously by the St. Charles County authorities in their efforts to pollute the atmosphere in St. Charles County by promoting false beliefs that Berry was involved in cocaine trafficking and child pornography. Closely coordinated with that "raid", the wrongful conspiracy under § 1985 also became transparent in its civil dimensions by the filing of the *Crawford* class action suit (removed to federal court) in St. Charles County Circuit Court just a few days later. The other removed cases followed. In all those cases, as in *Huck v. Berry* (filed soon after the officially-sanctioned burglaries by Vincent Huck and after Berry refused the blackmail), arbitrary and harsh rulings consistently adverse to Berry were made by biased judges with direct conflicts of interest which required them to recuse themselves. Those rulings show a consistent pattern of judicial refusal to apply the laws of Missouri equally to Berry. They can be

explained rationally only by a racial motive to destroy Berry, a visibly successful African-American.

Chuck Berry was targeted by purportedly hundreds of white female plaintiffs and their politically influential lawyers because of his race and wealth. Petitioner alleged on removal that the lawyers and "investigator" for those claimants conspired to use the civil and criminal processes of St. Charles County to attain that end. Under any standard, these allegations were sufficient to state a claim for violation of equal civil rights protected by § 1985 and were sufficient for removal under § 1443. The district court's remand rulings thus were erroneous as a matter of law.

The Court has made it clear that its jurisprudence in *Georgia v. Rachel* and *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), was not intended to be wholly and forever dispositive of every civil rights removal under the 1964 Civil Rights Act amendment to 28 U.S.C. § 1443: "A precise definition of the limitations of the phrase 'any law providing for . . . equal civil rights' in § 1443(1) is not a matter we need pursue to a conclusion". *Peacock*, 384 U.S. at 825. The *Peacock* Court went on to assume that both § 1971 (voting rights) and § 1981 (equality in the application of punishments, penalties and exactions) of Title 42 qualified under the test of *Georgia v. Rachel*, as laws "providing for . . . equal civil rights . . . construed to mean any law providing for specific civil rights stated in terms of racial equality" thus meeting the statutory definition of removability under 28 U.S.C. § 1443(1). *Peacock*, 384 U.S. at 825. *Accord, Johnson v. Mississippi*, 421 U.S. 213, 220-2 (1975).

In light of the observations by the Court over the years in *United Brotherhood, Peacock* and *Johnson* it defies elementary logic and historical common sense to find, as did the lower courts, that the Ku Klux Klan statute is not a law providing for equal civil rights stated in terms of racial equality for purposes of a § 1443(1) removal.

## II.

## THE LOWER COURTS ERRED IN RULING AS A MATTER OF LAW THAT A PATTERN OF RACIALLY DISCRIMINATORY CONDUCT IN RELATED STATE CRIMINAL AND CIVIL PROCEEDINGS WHICH AMOUNTS TO A "RACIALLY-MOTIVATED ECONOMIC LYNCHING" CAN FORM UNDER NO CIRCUMSTANCES A BASIS FOR REMOVAL PURSUANT TO THE CIVIL RIGHTS REMOVAL STATUTE.

The lower courts here held that under no circumstances could a pattern of racially-discriminatory conduct in multiple state court actions form a basis for a § 1443 removal because Petitioner did not allege a discriminatory state legislative enactment. Thus, it was ruled that Petitioner failed to satisfy *Rachel's* second prong (App. B and C).

The Court need look no further than *Rachel* itself for controlling authority making the lower courts' rulings erroneous as a matter of law. In *Rachel,* the Court held that a § 1443

> *removal* might be *justified,* even in the *absence* of a *discriminatory state enactment,* if an equivalent basis could be shown for an equally *firm prediction* that the defendant would be "denied or cannot enforce" the specified federal rights in the state court. Such a basis for *prediction* exists in the present case.

384 U.S. at 804 (emphasis added). *Rachel* upheld § 1443 removals of state court criminal prosecutions for trespass even though the state statute was not facially unconstitutional, but was applied to the removing parties in a racially discriminatory *manner.* The

*Rachel* defendants were prosecuted for criminal trespass, a law facially neutral, solely because of their race when they attempted to obtain service in a "whites-only" restaurant and refused to leave. The Court held that "[i]n the narrow circumstances of this case, *any* proceedings in the courts of the State will constitute a denial of the rights conferred by the Civil Rights Act of 1964 . . . if the allegations of the removal petition are true". *Id.* (emphasis in original).[2]

Petitioner alleged on removal that such a "firm prediction" — that he could not enforce his equal civil rights in the St. Charles County, Missouri Circuit Court — could be made from the record existing at the time of removal: (1) the unconstitutional "raid" on his estate; (2) press conferences falsely claiming he was a Black drug dealer; (3) bogus "child abuse" charges supposedly arising out of the videotapes on which the hundreds of punitive damages claims allegedly are based; and (4) numerous pre-trial rulings against Petitioner in the course of the punitive damages case which were contrary to Missouri law and defied rational explanation other than a racial discrimination motive. Clearly "any proceedings", *Rachel*, in the courts of Missouri "will constitute a denial", *id.*, of Petitioner's equal civil rights to be free from racial discrimination. The improper focus in the rulings of the lower courts in this case upon a misperceived need for discriminatory legislative enactments directly conflicts with this Court's 1966 decision in *Rachel*. This alone is reason enough to grant this Petition.

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2. *Neal v. Delaware*, 103 U.S. 370, 392 (1880) seems to indicate that racially dicriminatory state court decisions, violating the Fourteenth Amendment, could provide a basis for a civil rights removal.

**A. The Court's Removal Decisions Under the 1964 Civil Rights Act Conflict Among Themselves On A Key Issue Raised Here.**

Granting this Petition will permit the Court to reconcile the apparent conflicts between its own decision on the crucial point of whether only explicit legislative discrimination can be reached under the Civil Rights Removal power. Lower court cases construing § 1443, including the Eighth Circuit here, have cited to *Peacock*, 384 U.S. 808 and *Johnson*, 421 U.S. 213 for the dubious proposition that a § 1443 removal is proper only when the denial of equal civil rights is clear from discriminatory state laws. Of course, *Rachel* explicates no such limited interpretation of § 1443(1). So the question becomes how to interpret *Rachel, Johnson* and *Peacock* with any jurisprudential consistency.

The Court in *Peacock* distinguished on one level the removals of state criminal proceedings there from the successful removal in *Rachel* by noting that "in *Rachel* the defendants relied on the specific provisions of a pre-emptive federal civil rights law". 384 U.S. at 826. While the "pre-emptive" label was a ready explanation for that distinction, it hardly completes the inquiry required by the issues presented here. *Peacock* made clear that its rationale did not exhaustively define the outer parameters of which civil rights laws would justify removal under § 1443(1). *Id.* at 825. The *Peacock* Court also established that the essence of the removal inquiry was whether the deprivation of a protected federal right could be "clearly predicted". *Id.* at 828.

A prosecutor in the unsuccessful criminal proceeding fomented by the plaintiffs in these removed cases described Mr. Berry as a "nigger" they were out to "get" and made it apparent there is a strong racial component to these proceedings against Petitioner. This pervasive racial bias has taken many forms which have deprived Petitioner of his equal civil rights in the courts of St.

Charles County. The Eighth Circuit's decision in this case stands as precedent for the dangerous proposition that under no circumstances can a pattern of racially-discriminatory conduct in state court proceedings form a basis for a valid removal under § 1443, not even when those proceedings are converted into an "economic lynching". Although the *per curiam* Opinion glossed over this element of the district courts' analyses, it will be a sad day in the annals of civil rights jurisprudence if the district court is allowed to stand uncorrected in its assertion that these removals fail to satisfy the second prong of *Rachel's* § 1443 removal test because Chuck Berry's rights were not violated by Missouri *legislation.*

The *Rachel* Court noted that thte 1964 amendments to § 1443 were not suggestive of congressional intent to limit the scope of removal. In fact, *Rachel* noted Congress' "choice of the open-ended phrase". 384 U.S. at 789. In the words of the *Peacock* Court, this case is one of those rare situations where a "clear prediction" can be made that Petitioner's federal civil rights will be denied. 384 U.S. at 828. A long, sad history of unequal treatment and racially punitive rulings and sanctions underlies these removals.

Neither the Equal Protection Clause nor the protections of 42 U.S.C. § 1981 nor the prohibitions of § 1985(3) probably merit the label of "a preemptive federal civil rights law" invoke as a rationale by the *Peacock* Court. Yet it is surpassingly clear the the fundamental purpose of the Equal Protection Clause is to combat racial discrimination, *Palmore v. Sidoti, supra.* Obviously the Ku Klux Klan Act also exists to combat racial discrimination. In light of the Court's qualification or reservation concerning 42 U.S.C. § 1981 in *Peacock* and *Johnson*, it would appear that unequal application in a state court of a fine or penalty ("sanctions") against an African-American would be held removable even if such unequal application were not mandated by a state statute. Rigorous intellectual scrutiny is merited by the points Petitioner Berry

raises, but all has been withheld until now. Only the Court can provide the requisite systematic scrutiny now.

**B. The Proper Test In A Civil Case For Removal Under § 1443(1) Is Whether Or Not A "Clear Prediction" Can Be Made That Equal Civil Rights Will Be Violated.**

It is somewhat uncertain what the *Peacock* and *Johnson* Courts intended by their description of *Rachel* as a case involving a "pre-emptive" federal statute. But one can accept pre-emptive labeling as a tool for first-stage analysis while realizing that the label is not by itself a complete description of the proper analytic process. Rather, it is a shorthand for the Court's reasoning and public-policy formulation in defining the congressional intent behind the 1964 re-enactment of § 1443.

The keys to proper interpretation of § 1443(1), Petitioner submits, are clarity of prediction, the feasibility or policy practicalities connoted by the removal, and its implications for federalism. The Ku Klux Klan Act may not be a "pre-emptive" civil rights law, but surely its violation in state court criminal and civil proceedings that are a "racially motivated economic lynching" merits a "clear prediction", *Rachel*, that Mr. Berry's rights will be violated. It is not enough for the Court to wait for an eventual opportunity to review in a few years whether the Missouri high courts have acted to correct the evident bias of the St. Charles County Circuit Court. Merely requiring Mr. Berry to stand trial in St. Charles County on these suits violates his right to be free from conspiracies which violate the Ku Klux Klan Act.

The Court's jurisprudence has carefully left open the door to removal in restricted but compelling situations where the federal rights requiring the protection of a federal forum do not appear in a "pre-emptive" federal statute. In *Johnson v. Mississippi*, 421 U.S. at 220, the Court hinted at the eventuality of doing a case-by-case

analysis for determining removal in more difficult cases, such as here. While continuing to apply the two prongs of *Rachel*, the *Johnson* Court was careful to sprinkle its decision with qualifiers such as "[c]laims under statutes not protecting against racial discrimination will not suffice"; "without evidentiary basis does not, standing alone, satisfy"; and "the unusual case where an equivalent basis could be shown for an equally firm prediction". The Court has provided ample room for a civil case such as this one to be removed to the federal system under § 1443(1).

To hold that removal was proper here would not require the Congress to add "hundreds of new federal judges". *Peacock*, 384 U.S. at 834. While Congress did not intend to provide a federal forum for the thousands of Black criminal defendants in Southern state courts or to work "a wholesale dislocation of the historic relationship between the state and federal courts in the administration of the criminal law", *Id.* at 831, there is sound reason to find that Congress never intended that procedurally biased civil cases such as these should remain beyond the removal jurisdiction of the federal courts. *See* the remarks of Senator Dodd, as floor manager of the 1964 Act, 110 Cong. Rec. 6955 (use of court procedures as a means of intimidation). There can be scant doubt that intimidating Petitioner into parting with most, if not all of his wealth is what the police, prosecutorial and judicial authorities of St. Charles County have in mind. Their intent to advance the interests of the white female litigants is entitled to no deference. Surely Congress never intended to allow an outrage such as this to progress untouched by federal protection until long after potentially devastating punitive damages judgments are taken and executed.

The essential focus of the Court in *Johnson* was upon the issue of whether or not a "clear prediction" could be made. Petitioner strongly contends that this record presents such a "rare situation" offering a "clear prediction". It defies common sense to contend

the Court would hold that § 1985 is not a law providing for equal civil rights within the meaning of § 1443. Correct analysis of the Court's jurisprudence compels two contrary conclusions. First, the Court would hold that the Ku Klux Klan statute is a law providing for equal civil rights. Second, on this record the Court will find a basis for the requisite "clear prediction" that the state court proceedings in these five removed cases have operated and will operate to deprive Petitioner of his rights under § 1985 and the Equal Protection Clause, if the Writ issues.

While it is easier to apply *Rachel*'s two-prong analysis to federal statutes labeled as "pre-emptive", it by no means follows that invoking a federal right carrying that label is a requisite for § 1443(1) removal. To the contrary, careful exegesis of the Court's teachings compels one to confront the inescapable conclusion that the Court has explicitly refrained from any such formulation. It is difficult to accept that the Eighth Circuit intended its opinion to stand on this issue of first impression for the proposition that a violation of the Ku Klux Klan statute, even one which amounts to "a racially-motivated economic lynching" to strip Petitioner Berry of his royalty rights and other property, cannot justify removal.

**C. The Court Has Never Defined The Proper Standard For Removal Of Civil Actions And The Eighth Circuit Declined To Follow Precedents Of Other Courts Of Appeal.**

The Court apparently has considered only two civil rights removals of civil actions. *See Dubuclet v. Louisiana,* 103 U.S. 550 (1880) and *Schmidt v. Cobb,* 119 U.S. 286 (1886), neither discussing in detail the standards for removal. Since the 1964 Civil Rights Act the Court has considered no removals of civil actions under § 1443.

The Eighth Circuit's ruling conflicts with decisions by other Circuits. In *Sofarelli v. Pinellas County,* 931 F.2d 718 (11th Cir.

1991) a case was filed in state court seeking to enjoin Sofarelli from moving his home (a trailer). Mr. Sofarelli "suspected . . . that the plaintiffs had racial motivations for attempting to enjoin him from completing the house move". *Id.* at 724. The Eleventh Circuit, citing *Rachel,* held that "removal under § 1443 is *proper when a lawsuit filed in state court is itself the act* by which the movant's civil rights are violated" and approved Sofarelli's removal. *Id.* at 725 (emphasis supplied). Thus, *Rachel* has been interpreted to authorize removal under § 1443 of a civil lawsuit if the filing of the state court action was racially motivated. *See also Conrad v. Robinson,* 871 F.2d 612 (6th Cir. 1989) (holding a state libel action properly removed under § 1443(1) because it was filed in retaliation for exercise of Title VII rights).

The need to clarify the proper standard for removal of a civil case is highlighted by the Eighth Circuit's indifference to the probability that Petitioner Chuck Berry will have been financially devastated by Missouri's unconstitutional application of punitive damages long before the Court is able to review the St. Charles County Court's denials of his equal civil rights. *See Pacific Mut. Life Ins. Co. v. Haslip,* 111 S. Ct. 1032 (1991) and the misapplication of its "constitutional calculus" in *Wolf v. Goodyear Tire & Rubber Co.,* 808 S.W. 2d 868 (Mo. App. 1991). Missouri's onerous supersedeas bonding requirements will require posting of bonds satisfactory to the St. Charles County's racially biased judges to postpone execution against, and Sheriff's sales of all of Chuck Berry's musical properties before the appeal and review of abusive punitive damages judgements. *See* Mo. Rev. Stat. § 512.080 and Rule 81.09 Mo. R. Civ. P.

## CONCLUSION

Congress undoubtedly intended the purposely flexible language in § 1443 to protect against the financial equivalent of lynching through punitive damages carried out against a prominent and prosperous Black American who has been subjected to progressively egregious violations of his equal rights in the filing and prosecution of connected state criminal and civil actions. Petitioner is willing to confront his accusers on neutral ground where he cannot be "lynched" by hostile authorities. Certiorari should issue to (a) clarify the availability of a § 1443(1) removal when equal protection violations are alleged; (b) address as an issue of first impression whether 42 U.S.C. § 1985(3) is a law providing for equal civil rights for § 1443(1) removals; and (c) identify the standards underlying removal of a civil action under § 1443(1).

Respectfully submitted,

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## APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT – DATED AUGUST 20, 1992

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1721/1726/1731/1732/1933/2134EMSL

John Doe, et al.,

Plaintiff - Appellees,

vs.

Charles E. Berry, et al.,

Defendants - Appellants.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

August 20, 1992

Order Entered at the Direction of the Court:
s/ illegible
Clerk, U.S. Court of Appeals, Eighth Circuit

## APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JUNE 30, 1992

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1721

J. Doe,

Appellee,

v.

Charles E. Berry; Chuck Berry Communication Systems, Inc.,

Appellants.

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No. 92-1726

Hosana Huck; Marianne McKinley,

Appellees,

v.

Charles E. Berry; Chuck Berry Communication Systems, Inc.; Francine Gillium,

Appellants.

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*Appendix B*

No. 92-1731

A. Doe,

Appellee,

v.

Charles E. Berry; Chuck Berry Communication Systems, Inc.,

Appellants

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No. 92-1732

Thomas F. Jones; Hosana A. Huck; Marianne McKinley,

Appellees,

v.

Charles E. Berry,

Appellant.

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No. 92-1933

Nancy Crawford; Melissa Walker; Rep. Parties on behalf of a Definable Class,

Appellees,

v.

Charles E. Berry; Chuck Berry Communication Systems, Inc.,

Appellants.

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*Appendix B*

No. 92-2134

Rebecca Price,

Appellee,

v.

Charles E. Berry; Chuck Berry Communication Systems, Inc.,

Appellants.

Appeals from the United States District Court for the Eastern District of Missouri.
PUBLISHED

Submitted: June 9, 1992

Filed: June 30, 1992

Before JOHN R. GIBSON, Circuit Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

PER CURIAM.

Charles E. Berry, Chuck Berry Communication Systems, Inc., and Francine Gillium appeal from several district court orders remanding their cases to the state courts on the ground that they were not properly removed under 28 U.S.C. § 1443(1) (1988), the civil rights removal statute. Berry argues on appeal that he has established a pattern of racial hostility prohibited by several civil rights statutes, making removal proper. We affirm the judgments of

the district courts.[1]

A number of actions were filed against Berry and others in the Circuit Court of St. Charles County, Missouri, alleging invasion of privacy by secretly videotaping the plaintiffs. An interpleder action was also filed to determine ownership of the videotapes. After passage of some period of time and considerable litigation activity, Berry filed a petition for removal in each of the cases based on 28 U.S.C. §§ 1441(b) (1988), 1443, and 1446 (West Supp. 1992). Berry claimed that removal was possible pursuant to section 1443 because he "has been and will be denied his equal civil rights because of the racialy-motivated criminal prosecution which gave rise to and was in conjunction with the procedurally unconstitutional state civil actions which have been a race oriented economic lynching." Berry alleged, *inter alia*, that he had been deprived of rights that were specifically protected by 42 U.S.C. §§ 1983 (1988) and 1985 (1988) and 28 U.S.C. § 1443.

Chief Judge Filippine,[2] in *J. Doe v. Berry*, No. 91-1617-C-2 (E.D. Mo. Feb. 19, 1992), found that a person seeking removal under 28 U.S.C. § 1443 must show that he relies upon a " ' " right

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1 The Honorable Edward L. Filippine, Chief Judge, Stephen N. Limbaugh, Jean C. Hamilton, George P. Gunn, Jr., William L. Hungate, and Clyde S. Cahill, United States District Judges for the Eastern District of Missouri.

2 The district judges ruling on the other cases either adopted and incorporated Chief Judge Filippine's order, *see Huck v. Berry*, No. 91-1599-C-5 (E.D. Mo. Feb. 24, 1992) (Limbaugh, J.); *Jones v. Berry*, No. 91-1940-C-6 (E.D. Mo. Feb. 25, 1992) (Gunn, J.); *Crawford v. Berry*, No. 91-1597-C-3 (E.D. Mo. Feb. 21, 1992) (Hungate, J.); *Price v. Berry*, No. 91-1598-C-4 (E.D. Mo. Apr. 16, 1992) (Cahill, J.), or based their rulings on essentially the same reasoning Chief Judge Filippine used in his order. *See, e.g., Doe v. Berry*, No. 91-1616-C-7 (E.D. Mo. Feb. 25, 1992) (Hamilton, J.).

under any law providing for . . . equal civil rights," and that they are "denied or cannot enforce" that right in the court of [the state].' " Slip op. at 3 (quoting *Georgia v. Rachel*, 384 U.S. 780, 788 (1966)). The district court held that allegations of violations of 42 U.S.C. § 1983 did not meet the test in *Rachel* that the right allegedly being denied is a law " 'providing for specific civil rights stated in terms of racial equality.' " *Id.* at 4 (quoting *Rachel*, 384 U.S. at 792). The district court also held removal under 28 U.S.C. § 1443 based on alleged violations of 42 U.S.C. § 1985 to be improper for the same reasons. *Id.* The district court observed that "[a] defendant's contention that he will be denied a fair trial in state court is not a sufficient ground for removal." *Id.* at 5.

We expedited appeal and heard oral argument. The appeal from the remand is appealable under 28 U.S.C. § 1447(d) (1988) as removal was based on 28 U.S.C. § 1443.

Berry argues that the district court erroneously ruled that (1) he had failed to invoke a law providing for equal civil rights based on race; (2) a pattern of racial conduct in state and civil proceedings which amounted to a "racially motivated economic lynching" in no way forms a basis for removal; and (3) his pleadings under section 1443(1)[3] were insufficient. He also argues

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3 The relevant portion of 28 U.S.C. § 1443 states:

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisidiction thereof. . . .

that he was denied equal protection of laws when he was not given benefit of the laws giving preemptive effect to worker's compensation laws and that he is exposed to proceduraly unconstitutional, excessive awards of punitive damages unless he is allowed to proceed in federal court. Many of Berry's claims involve a St. Charles County circuit court judge, numerous expressions made in press conferences, and conflicts of interest of various judges participating in the cases.

After having heard argument, we are convinced that the orders of remand must be affirmed. The district courts' analyses of the removal issues under 28 U.S.C. § 1443(1) with reliance on 42 U.S.C. §§ 1983 and 1985(3) are not in error. Chief Judge Filippine properly followed *Rachel,* which held that "the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality." 384 U.S. at 792. Further, Chief Judge Filippine properly noted the controlling rule from *Rachel,* which ensures that:

> [T]he task of prediction would not involve a detailed analysis by a federal judge of the likely disposition of particular federal claims by particular state courts. That task not only would have been difficult, but it also would have involved federal judges in the unseemly process of prejudging their brethren of the state courts.

*Id.* at 803.

As the Supreme Court stated in *City of Greenwood v. Peacock,* 384 U.S. 808 (1966):

> It is *not* enough to support removal under § 1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be "denied or cannot enforce in the courts" of the State any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial. Under § 1443(1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.

*Id.* at 827-28 (emphasis in original) (citations omitted).

The issues involved in these cases can be decided in the state courts, which have equal responsibility for ruling on federal constitutional issues. Berry may then seek review of any adverse rulings in the United States Supreme Court.

*Appendix B*

We have considered and reject Berry's other arguments.

We affirm the orders of remand.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

## APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED APRIL 16, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

REBECCA PRICE,

Plaintiff,

v.

CHARLES E. BERRY,

Defendant.

Cause No. 91-1598-C(4).

MEMORANDUM AND ORDER

This matter is before the Court on plaintiff's objection to removal and defendant Berry's motion to consolidate. Defendant seeks to consolidate at least six causes filed in this court, causes No. 91-1597-C(3); 91-1599-C(5), 91-1616-C(7), 91-1617-C(2), and 91-1940-C(6) with this cause, No. 91-1598-C(4). Consolidation is only granted when there has been a concurrence among the judges presiding in the particular cases involved. By order dated February 19, 1992, the Honorable Edward L. Filippine denied an analogous motion to consolidate filed in that case. Therefore, this Court will deny defendant's motion to consolidate as moot.

*Appendix C*

The underlying cause of action sought to be removed in the cases listed herein arose out of similar or same circumstances and with respect to the issue of remand, the Court agrees with Judge Filippine's reasoning in *J. Doe v. Charles E. Berry,* No. 91-1617-C(2), and, accordingly, will adopt and incorporate that order as equally applicable in this case. Therefore,

IT IS HEREBY ORDERED that defendant's motion to consolidate is denied as moot.

IT IS FURTHER ORDERED that plaintiff's objection to removal is sustained.

IT IS FURTHER ORDERED that this matter is remanded to the Circuit Court for St. Charles County, Missouri.

Dated this 16th day of April, 1992.

s/ Clyde S. Cahill
Clyde S. Cahill
United States District Judge

## APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED FEBRUARY 25, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

A. DOE,

Plaintiff,

v

CHARLES E. BERRY, CHUCK BERRY COMMUNICATIONS SYSTEMS INC.,

Defendants.

Cause No. 91-1616C(7)

ORDER

In accordance with the memorandum and order filed this day, IT IS HEREBY ORDERED that this matter is REMANDED to the Circuit Court of St. Charles County, Missouri, from which it was removed.

Dated this 25th day of February, 1992

s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

*Appendix C*

## APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED FEBRUARY 25, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

A. DOE,

Plaintiff,

v.

CHARLES E. BERRY, CHUCK BERRY COMMUNICATIONS SYSTEMS INC.,

Defendants.

Cause No. 91-1616C(7)

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff's motion to remand. Both parties request a hearing.

Plaintiff originaly filed this action for personal injuries, invasion of privacy, and intrusion upon seclusion and privacy in the Circuit Court of St. Charles County, Missouri, on November 27, 1990. Defendants were served with a Summons and Petition in the state action on December 4, 1990. (Notice of Removal ¶ 2). Defendants filed a notice of removal pursuant to 28 U.S.C. §§

1331, 1343, 1441(b), 1443, and 1446 on August 2, 1991. (Notice of Removal ¶ 1). On August 22, 1991, Plaintiff filed a motion to remand, referring the Court to Respondent's Answers to Petitioner's Notice of Removal of Civil Action filed August 9, 1991.

Plaintiff moves for remand on the grounds the Defendants' notice of removal was untimely pursuant to 28 U.S.C. § 1446(b) and that Defendants have insufficient grounds for removal pursuant to 28U.S.C. § 1443.

Defendants contend that removal is proper pursuant to 28 U.S.C. § 1443 and timely pursuant to the second paragraph 28 U.S.C. § 1446(b).

Removal pursuant to 28 U.S.C. § 1443(1) is proper when a state civil action or criminal prosecution is "[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof." To meet the requirements of 28 U.S.C. § 1443(1), Defendants must show (1) that the right upon which they rely is a right under a law providing for equal civil rights and (2) that Defendants have been denied or cannot enforce that right in state court. *Georgia v. Rachel*, 384 U.S. 780, 788 (1966). Defendants specifically rely on the rights conferred in 28 U.S.C. §§ 1983 and 1985. (Notice of Removal ¶3). Neither 42 U.S.C. § 1983 nor 42 U.S.C. § 1985 provide for "specific civil rights stated in terms of racial equality" as required by 28 U.S.C. § 1443(1). *Id.* at 792. Therefore, Defendants have failed to meet the first requirement for removal pursuant to 28 U.S.C. § 1443(1). Furthermore, Defendants establish neither that the denial is "manifest in a formal expression of state law" nor that the case falls into the narrow circumstances that "*any* proceedings in the courts of the State will constitute a

denial." *Id.* at 803-04 (emphasis in original).

Defendants also cite 28 U.S.C. § 1441(b) as a basis of removal. 28 U.S.C. § 1441(b) does not provide an independent basis for federal court jurisdiction, but rather merely provides for the removal to federal courts of any cases over which the Court would have had original jurisdiction. *West v. Missouri Bd. of Law Examiners*, 520 F. Supp. 159, 160 (E.D. Mo.), *aff'd*, 676 F.2d 702 (8th Cir. 1981). In this case, Plaintiff's claims are based solely on state law, and there is no basis for removal pursuant to 28 U.S.C. § 1441(b).

Because the Court finds that removal is not proper under either 28 U.S.C. § 1441(b) or § 1443, the Court will not address the issue of timeliness.

IT IS HEREBY ORDERED that Plaintiff's motion to remand is GRANTED.

IT IS FURTHER ORDERED that the parties' requests for a hearing on the remand issue are DENIED.

IT IS FURTHER ORDERED that this matter is REMANDED to the Circuit Court of St. Charles County, Missouri from which it was removed.

Dated this 25th day of February, 1992.

s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

## APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED FEBRUARY 24, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HOSANNA HUCK, ET. AL.,

Plaintiffs,

vs.

CHUCK BERRY, ET. AL.,

Defendants.

No. 91-1599C(5)

ORDER

IT IS HEREBY ORDERED that the Order and Memorandum of the Honorable Chief Judge Edward L. Filippine in Cause No. 91-1617C(2), dated February 19, 1992, be and is ADOPTED and INCORPORATED herein.

IT IS FURTHER ORDERED that plaintiffs' motion for remand and for sanctions be and is GRANTED in part and DENIED in part in that this cause is remanded to the Circuit Court of St. Charles County. Sanctions will not be imposed.

IT IS FURTHER ORDERED that defendants' motion to

consolidate be and is DENIED.

IT IS FINALLY ORDERED that any pending motions may be considered by the Circuit Court of St. Charles County on remand.

Dated this 24th day of February, 1992.

s/ illegible
UNITED STATES DISTRICT JUDGE

## APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED FEBRUARY 24, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-1597C(3)

NANCY D. CRAWFORD, et al.,

Plaintiffs,

vs.

CHARLES E. BERRY, CHUCK BERRY COMMUNICATION SYSTEMS, INC., and THERESA YVONNE SCHMITT,

Defendants.

ORDER

This matter is before the Court on plaintiffs' motion to remand and for sanctions, to which defendant Charles E. Berry is opposed. Also before the Court is Berry's motion to consolidate.

Under Local Rule 7(F), motions to consolidate are to be filed in the lowest-numbered case of those sought to be consolidated and ruled on by the judge presiding in that case. Of the seven related actions of which this case is one, the lowest-numbered is *Charles E. Berry, etc., et al. v. Ronald L. Boggs, et al.*, No. 91-1586C(2). By order dated February 19, 1992, the Honorable Edward L. Filippine

has denied the analogous motion to consolidate filed in that case. Accordingly, the instant motion to consolidate is denied as moot.

Plaintiffs move for remand on the gounds that (1) the notice of removal was not timely filed and was filed on behalf of only one of the three defendants, and (2) the case is not a proper one for removal under the statutes governing removal. By order dated February 19, 1992 in *J. Doe v. Charles E. Berry, et al.*, No. 91-1617C(2), Judge Filippine granted a motion to remand analogous to the instant motion. Here as in *J. Doe*, all three counts of the petition are based on theories of common law tort. Removal was predicated on the same basis in *J. Doe* as it is here, i.e., on Berry's claim (stated in the notice of removal only, and not in any causes of action brought by Berry in this case) that he:

> is and has been denied and cannot enforce in the courts of the State of Missouri his rights to equal protection of the laws, due process of law, freedom from excessive fines, and a free and impartial jury trial as generaly guaranteed by the Fifth, Seventh, Eighth, and Fourteenth Amendments to the Constitution and specificaly protected by 42 U.S.C. §§ 1983, 1985 and 28 U.S.C. § 1443.

Notice of Removal, p. 2.

This Court finds Judge Filippine's reasoning in *J. Doe* to be equally applicable to the instant case. A copy of Judge Filippine's order is attached hereto and incorporated herein by reference. For the reasons stated in Judge Filippine's order, this Court holds that removal of the instant case is not proper under either 28 U.S.C. § 1441(b) or § 1443. In view of that conclusion, the Court does not

address plaintiffs' arguments concerning timeliness and the failure of the other defendants to join in the notice of removal. The instant case is remanded to the Circuit Court of St. Charles County.

Plaintiffs seek sanctions under Fed.R.Civ.P. 11 and 28 U.S.C. § 1447(c), arguing that "this matter was removed improvidently without any justification whatsoever." Motion to Remand and for Sanctions, p. 8. Removal having been found improper, the Court will grant the motion for sanctions to the extent that it is based on § 1447(c), which provides that upon remand the Court "may require payment of just costs and any actual expenses, including attorney fees, incured as a result of removal." Because Berry's opposition to the motion to remand offers non-frivolous arguments concerning both timeliness and availability of removal under §§ 1441 and 1443, the Court denies the motion to the extent that it is based on Rule 11, Plaintiffs are ordered to file, within seven days, appropriate affidavits and documentation supporting their claim for attorney fees and expenses incurred as a result of removal. Within seven days thereafter, defendant Berry may file with the Court any response to plaintiffs' claims and support therefor. The Court warns that insufficiently documented claims and claims for expenses not incurred due to removal will be rejected and may result in a reversal of the Court's award of costs and fees.

Accordingly,

IT IS HEREBY ORDERED that "petititioner's motion to consolidate" is denied as moot.

IT IS FURTHER ORDERED that plaintiffs' motion to remand and for sanctions is granted in part and denied in part. To the extent that the motion seeks remand, it is granted, and this matter is remanded to the circuit Court of St. Charles County, Missouri. To

the extent that the motion seeks sanctions based on Fed.R.Civ.P. 11, it is denied. To the extent that the motion seeks sanctions based on 28 U.S.C. § 1447(c), it is granted.

IT IS FURTHER ORDERED that plaintiffs shall file, within seven (7) days of the date of this order, appropriate affidavits and documentation supporting their claim for attorney fees and expenses incurred as a result of removal. Within seven (7) days thereafter, defendant Berry may file a written response thereto. Insufficiently documented claims and claims for expenses not incurred due to removal will be rejected and may result in a reversal of the Court's award of costs and fees under 28 U.S.C. § 1447(c).

s/ illegible
UNITED STATES DISTRICT JUDGE

Dated: 2-21-92

*Appendix C*

## APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI DATED FEBRUARY 19, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-1617 C (2)

J. DOE,

Plaintiff,

v.

CHARLES E. BERRY and CHUCK BERRY COMMUNICATION SYSTEMS, INC.,

Defendants.

ORDER

In accordance with the memorandum and order filed this date and incorporated herein,

IT IS HEREBY ORDERED that this mater is REMANDED to the Circuit Court for St. Charles County, Missouri, from which it came.

Dated this 19th day of February, 1992.

s/ Edward L. Filippine
UNITED STATES DISTRICT JUDGE

*Appendix C*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-1617 C (2)

J. DOE,

Plaintiff,

v.

CHARLES E. BERRY and CHUCK BERRY COMMUNICATION SYSTEMS, INC.,

Defendants.

MEMORANDUM AND ORDER

This matter is before the Court on plaintiff's motion to remand and defendants' motion to consolidate. Defendant Berry opposes plaintiff's motion to remand. Both parties request a hearing on the remand issue.

Plaintiff originally filed this action in the Circuit Court of the County of St. Charles, State of Missouri. Plaintiff seeks damages for personal injuries, invasion of privacy and intrusion upon seclusion and privacy allegedly resulting from the individual defendant's secret videotaping and photographing of the female plaintiff while she used the bathroom and dressing facilities at the Southern Aire restaurant. Defendant corporation allegedly operated the restaurant on premises leased from the individual defendant. Plaintiff further alleges the individual defendant is the

sole shareholder of the corporate defendant. It is undisputed that the individual defendant was served with process and complaint on or about January 18, 1991. On August 2, 1991, the individual defendant sought removal of the action to this Court based on 28 U.S.C. §§ 1441(b), 1443 and 1446 and this Court's jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Plaintiff moves for remand on the gounds 1) removal was untimely under 28 U.S.C. § 1446(b) and, 2) defendants have insufficient grounds for removal.

Defendant Berry contends that removal is proper because he "has been and will be denied his equal civil rights because of the racially-motivated criminal prosecution which gave rise to and was in conjunction with the procedurally unconstitutional state civil actions which have been a race oriented economic lynching." Defendant Berry's Memorandum in Opposition to Motion to Remand, filed September 27, 1991, at 12. Defendant Berry alleges that judicial and prosecutorial personnel in St. Charles County, Missouri, are prejudiced against him and have engaged in a variety of acts which that defendant contends deprive him of his "rights to equal protection of the laws, due process of law, freedom from excessive finds, and a free and impartial jury trial as generally guaranteed by the Fifth, Seventh, Eighth, and Fourteenth Amendments to the Constitution and specifically protected by 42 U.S.C. §§ 1983, 1985 and 28 U.S.C. § 1443." Notice of Removal of Civil Action, filed August 2, 1991 at 1-2. Defendant Berry urges that he cannot enforce his civil rights guaranteed to United States citizens in the Missouri state courts and therefore removal is proper under 28 U.S.C. § 1443(1).[1]

---

1 28 U.S.C. § 1443(2) confers authority to remove only upon federal officers or agents. *City of Greenwood v. Peacock*, 384 U.S. 808 (1966). Therefore, because no federal officers or agents are involved, the Court assumes defendant Berry is asserting authority to remove under § 1443(1) only.

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In response to plaintiff's timeliness argument, defendant Berry asserts that the second paragraph of 28 U.S.C. § 1446(b) provides for an extended period of time for filing a notice of removal in civil rights cases analogous to the extension of time provided for filing civil rights complaints in federal courts under the "continuing violation" theory. The Court will first address whether the individual defendant's allegations against the Missouri state court and prosecutor are sufficient to permit removal under either 28 U.S.C. § 1441(b) or 28 U.S.C. § 1443. Only if the Court finds sufficient grounds for removal under either of these sections will it address the parties' timeliness arguments.

Removal is proper under 28 U.S.C. § 1443(1) when a civil action or criminal prosecution is commenced in state court "[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof[.]" The United States Supreme Court has held that defendants seeking removal under this section must meet a two part test. "They must show both that the right upon which they rely is a 'right under any law providing for * * * equal civil rights,' and that they are 'denied or cannot enforce' that right in the court of [the state]." *Georgia v. Rachel,* 384 U.S. 780, 788 (1966). To meet the first of the test, a defendant must show that the law under which a right is allegedly being denied is a law "providing for specific civil rights stated in terms of racial equality." *Id.* at 792. The Supreme Court gave as examples of such a law The Civil Rights Act of 1964, "as distinguished from laws, of which the due process clause and 42 U.S.C. § 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." *Id.* (quotation omitted). Therefore, removal is not proper under 28 U.S.C. § 1443 based on alleged violations of 42 U.S.C. § 1983.

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Defendant Berry specifically relies on 42 U.S.C. § 1983 as a law under which he is deprived of rights in seeking removal of this case. He also relies on alleged deprivations of rights under 42 U.S.C. § 1985. Berry does not specify under which subsection of § 1985 he relies. However, 42 U.S.C. § 1985 does not provide for "specific civil rights stated in terms of racial equality" but confers general rights upon all citizens. *Rachel*, 384 U.S. at 792. Therefore, for the same reasons removal of this case is improper for alleged violations of 42 U.S.C. § 1983, removal under 28 U.S.C. § 1443 based on alleged violations of 42 U.S.C. § 1985 also is improper. Even assuming that Berry could prove he was denied rights under both §§ 1983 and 1985, removal is not proper on those grounds.

Furthermore, to the extent Berry may be asserting as grounds for removal any misconduct by the state judiciary or state prosecutor, these are insufficient grounds for removal under 28 U.S.C. § 1443. In order for state action to be a sufficient ground for removal under § 1443, the state officials must be acting pursuant to a state law or statute. *Rachel*, 384 U.S. at 798. The Supreme Court was held

> removal is not warranted by an assertion that a denial or rights of equality may take place and go uncorrected at trial. Removal is warranted only if it can be predicted by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts.

*Id.* at 800. A defendant's contention that he will be denied a fair trial in state court is not a sufficient ground for removal. *Sullivan v. Missouri*, 588 F.2d 579, 580 (8th Cir. 1978) (quoting *Greenwood v. Peacock*, 384 U.S. 808, 827-28 (1966)). *Accord, Powell v.*

*Arkansas*, 4334 F.2d 604, 605 (8th Cir. 1970). Federal courts are not to involve themselves "in the unseemly process of prejudging their brethren of the state courts." *Rachel*, 384 U.S. at 803-04. Therefore defendant Berry has not stated sufficient grounds for removal under 28 U.S.C. § 1443 and this case will be remanded to state court.

In the notice of removal Berry also relies on 28 U.S.C. § 1441(b) as a basis for removal. Although Berry makes no argument based on that section in his Memorandum in Oposition to the Motion to Remand, the Court will discuss removal under 28 U.S.C. § 1441(b) because it is cited in the notice of removal.

28 U.S.C. § 1441(b) provides for removal of "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States. . . ." 28 U.S.C. § 1441(b). 28 U.S.C. § 1441(b) "does not provide an independent basis for federal court jurisdiction, but rather merely provides for the removal to federal courts of any cases which the Court would have had original jurisdiction over." *West v. Missouri Board of Law Examiners*, 520 F. Supp. 159, 160 (E.D. Mo.), *aff'd*, 676 F.2d 702 (8th Cir. 1981).

To the extent defendant Berry may be seeking removal pursuant to 28 U.S.C. § 1441(b), removal is proper only if the case could have originally been brought in federal court based on a claim arising under federal law. The claim based on federal law must be " 'an essential element of plaintiff's cause of action' " and the claim must be clear on the face of the petition " 'unaided by the answer or petition for removal.' " *Evans v. Missouri Pacific R. Co.*, 795 F.2d 57, 58 (8th Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987) (quoting *First Nat'l Bank v. Aberdeen Nat'l Bank*, 627 F.2d 843, 849 (8th Cir. 1980)). *Accord, M. Nahas & Co. v. First Nat'l Bank of*

*Hot Springs*, 930 F.2d 608 (1991) (finding that jurisdiction pursuant to 28 U.S.C. § 1441(b) "exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Id.* at 611). Further, "the plaintiff is the master of h[er] claim and may avoid federal removal jurisdiction by exclusive reliance on state law." 930 F.2d at 611 (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). In this case, plaintiff's claims are based solely on state common law and therefore the case may not be removed pursuant to 28 U.S.C. § 1441(b).

Because this Court finds that removal is not proper under either 28 U.S.C. § 1441(b) or § 1443, the Court will not address the parties' timeliness arguments.

After reviewing the motion to remand, the supporting memorandum, and defendants' memorandum in opposition, the Court finds that a hearing is unnecessary to the determination of the issue before the Court. Consequently, the requests for a hearing will be denied.

As a result of the Court's decision to remand this case back to the state court, defendants' motion to consolidate will be denied to the extent it seeks consolidation with Cause No. 91-1586 C(2) and any other claim pending in this jurisdiction.

Accordingly, after careful consideration,

IT IS HEREBY ORDERED that plaintiff's motion to remand is GRANTED.

IT IS FURTHER ORDERED that the parties' requests for a hearing on the issue of remand are DENIED.

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IT IS FURTHER ORDERED that defendants' motion to consolidate is DENIED.

Any remaining motions may be considered by the appropriate state court on remand. An appropriate order shall accompany this memorandum and order.

Dated this 19th day of February, 1992.

s/ Edward L. Filippine
UNITED STATES DISTRICT JUDGE

## APPENDIX D — RELEVANT CONSTITUTION AND STATUTORY PROVISIONS

Section I of the Fourteen Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The Civil Rights Removal Statute, 28 U.S.C. § 1443(1), provides:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof.

The Ku Klux Klan Act, 42 U.S.C. § 1985(3), provides in pertinent part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any persons or class of persons of the equal protection of the laws, or of equal privileges and immunities

under the laws; . . . in any case of conspiracy set forth in this Section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his persons or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Supreme Court, U.S.
FILED
JAN 8 1993
OFFICE OF THE CLERK

No. 92-883

In The

# Supreme Court of the United States

October Term, 1992

CHARLES E. BERRY,

*Petitioner,*

*vs.*

A. DOE, J. DOE, HOSANA A. HUCK, MARIANNE McKINLEY, REBECCA PRICE, and NANCY CRAWFORD and MELISSA WALKER as Representative Parties on Behalf of a Definable Class,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## BRIEF FOR RESPONDENT HOSANA A. HUCK AND MARIANNE McKINLEY

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## QUESTIONS PRESENTED FOR REVIEW

I. Mr. Berry's allegations that state court damage actions for invasion of privacy have violated his rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1985(3) do not invoke laws providing for equal civil rights for purposes of removal under the Civil Rights Removal Act, 28 U.S.C. § 1443(1), because under settled case law, neither the Fourteenth Amendment Equal Protection Clause nor 42 U.S.C. § 1985(3) is a law providing for specific civil rights stated in terms of racial equality.

II. Mr. Berry's allegation of a pattern of racially-motivated actions during the course of state court criminal and civil proceedings provides no basis for invoking the Civil Rights Removal Act, 28 U.S.C. § 1443 (1) to remove state court damage actions to federal court, in that controlling precedent of this Court holds that state officials' actions must be pursuant to some explicit state law or statute to invoke removal under § 1443, and Mr. Berry fails to allege that any Missouri statute or law compels or mandates the misconduct he alleges. To allow removal, this Court would have to engage in the "unseemly process of prejudging their brethren of the state courts." *Georgia v. Rachel*, 384 U.S. 803-04 (1966).

III. The record before the district court and the Eighth Circuit conclusively establishes that the sanction orders entered against Mr. Berry and his counsel in the state court proceedings were richly deserved due to his contumaceous and deliberate refusal to comply with discovery orders and his deliberate efforts to delay the state court damage cases against him. Therefore, this case is factually inappropriate for this Court to exercise its discretion to review the abstract questions of law presented in petitioner's Brief.

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Amendment Equal Protection Clause nor 42 U.S.C. § 1985(3) is a law providing for specific civil rights stated in terms of racial equality. ..... 14

II. Mr. Berry's allegation of a pattern of racially-motivated actions during the course of state court criminal and civil proceedings provides no basis for invoking the Civil Rights Removal Act, 28 U.S.C. § 1443(1) to remove state court damage actions to federal court, in that controlling precedent of this Court holds that state officials' actions must be pursuant to some explicit state law or statute to invoke removal under § 1443, and Mr. Berry fails to allege that any Missouri statute or law compels or mandates the misconduct he alleges. To allow removal, this Court would have to engage in the "unseemingly process of prejudging their brethren of the state courts." *Georgia v. Rachel*, 384 U.S. 803-04 (1966). ..... 17

III. The record before the district court and the Eighth Circuit conclusively establishes that the sanction orders entered against Mr. Berry and his counsel in the state court proceedings were richly deserved due to his contumaceous and deliberate refusal to comply with discovery orders and his deliberate efforts to delay the state court damage cases against him. Therefore, this case is factually inappropriate for this Court to exercise its discretion to review the abstract questions of law presented in petitioner's Brief. ..... 23

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## STATEMENT OF THE CASE

Respondents, Hosana A. Huck (Ms. Huck) and Marianne McKinley (Ms. McKinley) are involved in two cases in the state courts of Missouri with petitioner, Charles E. Berry (Mr. Berry). In *Huck et al. v. Berry,* No. 92-1726, in the Circuit Court of St. Charles County, Missouri, Ms. Huck and Ms. McKinley allege in their state court Petition, that Mr. Berry and others have invaded their privacy by secretly videotaping them using the women's restroom at a restaurant owned by Mr. Berry. In *Jones et al. v. Berry,* No. 92-1732 in the Circuit Court of St. Charles County, Missouri, Ms. Huck, Ms. McKinley and their attorney filed a state Interpleader action seeking a court order allowing the attorney to deposit certain videotape evidence with the state court, pending a determination of who was ultimately entitled to possession or ownership of the videotapes. Neither of the state court Petitions contains any allegation whatsoever relating to race; they both arise from simple state court law damage actions for invasion of privacy.

Mr. Berry attempted to remove these actions, and four other similar state court damage suits, to federal court, making conclusory, vague and outrageous allegations of a pattern of racially-motivated hostility toward him in these state court lawsuits. Mr. Berry alleges a massive conspiracy involving all of the state court damage plaintiffs, their attorneys, St. Charles County deputy sheriffs, and members of the Missouri state court judiciary to deprive him of his rights to equal protection of the law, based upon his race, to foster the state court damage suits. Despite his fantastic charges of misconduct and racial bias on the part of St. Charles County Circuit Judges, Mr. Berry has not sued any member of the state judiciary.

Mr. Berry's removal Petitions were filed in these respondent's cases on August 2, 1991 and September 20, 1991. So far, the

attempted removal has delayed the state court damage proceedings by sixteen (16) months.

Mr. Berry's basis for removal, according to his Brief, is violation of his rights to equal protection of the laws as guaranteed by the Fourteenth Amendment and 42 U.S.C. § 1985(3). Neither of those provisions provides any basis for removal, as neither is a law providing for specific civil rights stated in terms of racial equality.

Mr. Berry's wild allegations regarding drug raids, child abuse prosecutions, defamatory police and prosecutorial press conferences have no relationship whatsoever to Ms. Huck's and Ms. McKinley's civil damage suits or the *Jones v. Berry* Interpleader action. All Ms. Huck and Ms. McKinley and their attorneys have done is attempt to pursue state common law damage actions for invasion of privacy, alleging that these women were surreptitiously videotaped using private stalls in a women's restroom at the Southern Aire Restaurant in Wentzville, Missouri, owned by Mr. Berry. Race is not a factor; these women would be just as outraged had these disgusting videotapes been made by a white, yellow or red individual.

As to Mr. Berry's allegations that the St. Charles County judiciary has exhibited racial bias in its rulings, in Ms. Huck and Ms. McKinley's cases the court rulings have been correct, procedurally and substantively, under state law. To the extent that those rulings have been in Mr. Berry's favor, he has ignored them in his briefing to this Court. To the extent those rulings have been against him, there have been good reasons for those rulings.

Mr. Berry has also ignored the background of the *Jones v. Berry* Interpleader case, and why that suit was filed and what relief it seeks. The Interpleader suit was filed only after Mr. Berry himself sued Ms. Huck and her attorney, claiming that they had

*converted his videotapes.* When another individual also claimed a right to possess the tapes, Mr. Jones, Ms. Huck and Ms. McKinley filed the Interpleader suit to allow the videotapes to be deposited with the trial court so that these competing claims could be adjudicated. The Interpleader suit was a proper and appropriate procedure under state law, necessitated in large part by Mr. Berry's own actions. His current claim, that the Interpleader action was a "vehicle to unlawfully circumvent his right to a jury trial" is ludicrous.

Mr. Berry, in essence, contends that these personal injury cases were rigged against him because of his race and wealth. As to Ms. Huck's and Ms. McKinley's case, the plaintiff sued not only Mr. Berry, but his corporation which owned and operated the restaurant business, a Ms. Gillium, the manager of the restaurant, and a Ms. Schmitt who allegedly assisted Mr. Berry in making the videotapes. And, far from being rigged, Ms. Huck and Ms. McKinley have been unable after over three years of litigation to get their damage suit to trial, largely because of the procedural maneuverings and delaying tactics of Mr. Berry. A reading of the full record provides overwhelming evidence that the attempted removal of these cases, the appeal to the Eighth Circuit and this resulting Petition for Certiorari are only the latest efforts by Mr. Berry to delay and hinder the progress of the state court damage actions.

According to Mr. Berry this case "presents the novel question of law whether a 'racially motivated economic lynching' in the civil and criminal proceedings against Petitioner in St. Charles County. . . " suffice to state a basis for removal under § 1443(1). (Petitioner's Brief at p. 3). Under well-settled legal principles decided by this Court, there is no basis for removal. Moreover, in this brief, Ms. Huck and Ms. McKinley will demonstrate that Mr. Berry's factual allegations regarding the proceedings in the cases below are simply untrue.

A. ***Huck and McKinley v. Berry et al.***

This state court damage action against Mr. Berry and others alleges that Mr. Berry invaded the plaintiffs' privacy by videotaping them using the women's restroom at his restaurant without their permission. The plaintiffs also alleged that the caucasian manager of the restaurant was negligent in permitting the videotaping to occur, and that a caucasian acquaintance of Mr. Berry assisted him in making the videotapes. All three were defendants.

On March 16, 1990, Mr. Berry called for hearing his Motion to Dismiss the case for lack of subject matter jurisdiction, claiming that the Missouri worker's compensation law provided the exclusive remedy for plaintiffs as a result of the restroom videotaping. After extensive briefing and argument before the Circuit Court, Mr. Berry's Motion to Dismiss was overruled March 16, 1990.

In his allegations concerning the procedural history of these cases below, Mr. Berry ignores the fact that the Circuit Court granted him requested relief on deadlines and discovery matters on February 26, 1990, March 30, 1990, April 2, 1990, April 4, 1990, April 12, 1990, June 29, 1990 and September 4, 1990. The Circuit Court also refused to grant Ms. Huck and Ms. McKinley's Motion to Compel Mr. Berry's co-defendant, Ms. Schmitt to answer questions on deposition on December 7, 1990 and March 3, 1991. In short, Mr. Berry has received both favorable and unfavorable rulings in this case, as have plaintiffs.

Mr. Berry's Notice of Removal in *Huck v. Berry* was filed August 2, 1991. The original Petition had been filed February 26, 1989, and a Second Amended Petition was filed December 7, 1990. The circuit court's docket sheet reveal that the last activity in *Huck v. Berry* in the Circuit Court of St. Charles, Missouri was Plaintiff's

Response to Defendants' Request for Production of Documents, filed April 19, 1991. Thus, the court record below reveals that the Notice of Removal was filed approximately one and one-half years after the filing of the Second Amended Petition, and about four months after the filing of the last preceding papers in the circuit court.

B. ***Berry v. Jones and Huck***

On April 27, 1990, Mr. Berry filed a suit against Ms. Huck and her attorney Mr. Jones. In Count I of his Petition, Mr. Berry alleged that Ms. Huck and her attorney had converted his videotapes.

On May 29, 1990, Ms. Huck and Mr. Jones propounded Interrogatories to Mr. Berry. After Mr. Berry filed responses to the Interrogatories, Mr. Jones filed a Motion to Compel Interrogatory Answers, claiming that Mr. Berry had given vague and incomplete Answers to two of those interrogatories. On September 21, 1990, Mr. Berry's counsel agreed and was ordered to fully answer the two interrogatories in question within twenty (20) days. Mr. Berry failed to answer those interrogatories within twenty (20) days in violation of the Order. Mr. Jones' counsel then wrote counsel for Mr. Berry and inquired as to why the answers were not filed. When the answers were still not filed, Mr. Jones' counsel contacted counsel for Mr. Berry and advised that the interrogatory answers were needed prior to depositions scheduled for October 29, 1990. Mr. Berry's counsel agreed to make every effort to file the interrogatory answers before the depositions. The interrogatories were not answered and Mr. Jones' counsel then filed a Motion for Sanctions and scheduled it for November 16, 1990. At that hearing, Mr. Berry's counsel again requested additional time to file the answers.

Mr. Berry's former counsel then withdrew, and his present counsel entered an appearance.

At Mr. Berry's deposition, he was asked about the two as-yet unanswered interrogatory questions. Mr. Berry did not give a definitive answer on the questions concerning which specific videotapes he claimed were taken from him, or who he claimed Mr. Jones had shown them to.

The Motion for Sanctions was again scheduled for hearing on November 30, 1990. The day before that hearing Mr. Berry's counsel called and again asked for additional time to answer the interrogatories. Mr. Jones' counsel agreed to allow five (5) additional days to answer those interrogatories. On the fifth day, Mr. Berry filed his supplemental answers to the two interrogatories which stated only that the information requested was, or could have been covered in the deposition of Mr. Berry. Having sought answers to the interrogatories for eight (8) months, Mr. Jones then filed a new Motion for Sanctions alleging that the supplemental answers were evasive and deficient, and seeking dismissal of Berry's Petition as a sanction for defendant's deliberate and repeated violation of the trial court's discovery Order.

On December 26, 1990, Mr. Jones served a Notice of Hearing upon Mr. Berry's attorney calling up the Motion for Sanctions for hearing on Friday, January 4, 1991. Mr. Jones' attorney appeared on January 4, 1991, but Mr. Berry's counsel failed to appear. The trial court sustained the Motion for Sanctions and dismissed the cause with prejudice as to Mr. Jones for Mr. Berry's failure to comply with the court's Order dated September 21, 1990. Mr. Berry's counsel filed no Motions for Protective Order or papers seeking any continuance prior to the January 4, 1991 hearing date on the Motion for Sanctions.

Mr. Berry's counsel then filed a Motion for Reconsideration of the Order of Dismissal on January 14, 1991. In the Motion for Reconsideration, Mr. Berry's counsel did not allege that anyone agreed to continue the January 4 hearing on the Motion for

Sanctions. Rather, Mr. Berry's counsel claimed that he had to be out of the city on more urgent business, despite the fact that the interrogatories had been pending for eight (8) months and Mr. Jones' counsel had made three previous attempts to have the Motion for Sanctions heard, on November 3, 1990, November 16, 1990 and November 30, 1990. It was with this procedural background that the Missouri circuit judge entered his sanctions Order, and denied Mr. Berry's Motion for Reconsideration of that Order.

A second sanctions Order was entered in *Berry v. Huck and Jones* on March 8, 1991, imposing a two thousand four dollar ($2,004) monetary sanction against Mr. Berry and his attorney due to Ms. Huck's inability to take the deposition of Ms. Schmitt. On October 16, 1990, Ms. Huck had served Ms. Schmitt, then a non-party witness regarding this action, with a subpoena to appear on December 17, 1990 to give her deposition. Ms. Schmitt was served with the subpoena by a certified court reporter and on November 6, 1990, Ms. Schmitt cashed the witness fee check tendered to her with the subpoena. On December 5, 1990, counsel for Ms. Huck filed a Notice of Deposition regarding the deposition of Ms. Schmitt, and the notice was served upon Mr. Berry's counsel. The notice scheduled the deposition for December 17, 1990. At no time prior to that date, did either the witness, Ms. Schmitt, or Mr. Berry file any Motion to Quash the subpoena, any Motion for Protective Order or any pleadings seeking any other relief regarding the subpoena or the deposition. On December 13, 1990, Ms. Huck's counsel notified Mr. Berry's counsel by facsimile letter that the deposition scheduled for December 17, 1990 would go forward. However, Ms. Schmitt failed to appear for her deposition on December 17, 1990 although defendants' counsel were present and ready to proceed.

The reason Ms. Schmitt failed to appear was that Mr. Berry's counsel directed her not to do so despite the subpoena lawfully

served upon her. Mr. Berry's counsel unabashedly stated in open court that he had advised Ms. Schmitt that, until she got a lawyer, she should not appear for the deposition. Following the aborted deposition, Ms. Huck filed her Motion for Sanctions on January 11, 1991 seeking either dismissal of Mr. Berry's action or an Order directing Mr. Berry and his counsel to pay to Ms. Huck the sum of two thousand four dollars ($2,004) representing attorney's fees incurred in connection with the attempt to take Ms. Schmitt's deposition. Ms. Huck claimed that Mr. Berry's counsel's conduct was improper, in that he had interfered and unlawfully obstructed Ms. Huck's access to evidence. Mr. Berry's counsel acknowledged that he did not represent Ms. Schmitt.

The Motion for Sanctions was called for hearing on January 18, 1991 with all counsel appearing. The trial court heard argument of counsel and received Ms. Huck's attorney's affidavit by stipulation. The trial court then found the issues in favor of Ms. Huck and granted sanctions against Mr. Berry and his attorney in the amount of two thousand four dollars ($2,004) representing the costs, expenses and reasonable attorney's fees incurred by Ms. Huck in connection with the unsuccessful attempt to take Ms. Schmitt's deposition on December 17, 1990 and in bringing the motion. It is with this procedural background that the Missouri circuit judge imposed the second Sanction Order.

Also in *Berry v. Huck and Jones* on June 4, 1990, Ms. Huck filed a Motion to Dismiss alleging, *inter alia*, that there was another action pending between the same parties in the same court (that being Berry's identical counterclaim against Ms. Huck in the original *Huck v. Berry* action). Ms. Huck's Motion to Dismiss was noticed for hearing on March 8, 1991. On March 8, 1991, the parties appeared and the Missouri circuit judge ordered *Berry v. Huck and Jones* dismissed as to Ms. Huck. Mr. Berry has made no complaint about that ruling in his appeal or in his Brief in this Court. Thus, as of March 8, 1991, both Mr. Jones and Ms. Huck had

been dismissed from the *Berry v. Huck and Jones* action.

Mr. Berry does complain in his Brief of an April 3, 1991 ruling of the Missouri circuit judge granting "*ex parte*" Mr. Jones' Motion to Certify as final and appealable the January 4, 1991 Sanctions Order dismissing Mr. Jones from the litigation. Yet, by April 3, 1991, both Mr. Jones and Ms. Huck had already been dismissed from the case and the Order dismissing Mr. Jones had become final and appealable by operation of law upon the dismissal of Ms. Huck on March 8, 1991. Thus, the Motion to Certify the earlier sanction Order as final and appealable was moot and had no effect on Mr. Berry's appeal rights. Mr. Berry's counsel was present in court on May 8, 1991 when Ms. Huck, the last remaining defendant, was dismissed from *Berry v. Huck and Jones.*

Mr. Berry also fails to advise the Court that on June 14, 1990, the same Missouri circuit judges granted his request for additional time regarding plaintiffs' discovery requests. On July 20, 1990 the court granted him leave to file his Amended Petition, and on August 24, 1990 the trial court denied Mr. Jones' Motion for Summary Judgment. In short, Mr. Berry, Mr. Jones and Ms. Huck each received favorable and unfavorable rulings from the Missouri circuit court.

### C. *Jones, Huck and McKinley v. Berry* (Interpleader Suit)

As previously noted on April 27, 1990, Mr. Berry filed his Petition for conversion against Ms. Huck and her attorney Mr. Jones alleging that they had converted certain of his videotapes. Mr. Jones had also received a demand from one Vincent Huck, claiming that he was entitled to possession of the videotapes. Accordingly, Mr. Jones, Ms. Huck and Ms. McKinley were faced with several competing demands regarding the videotapes: Mr. Berry's suit claiming that his property had been converted, Mr. Huck's demand for possession, and the need to preserve the

videotapes undamaged for use as evidence in the pending damage action *Huck v. Berry.*

Accordingly, a Petition in Interpleader was filed May 3, 1990, approximately one week after Mr. Berry sued Mr. Jones and Ms. Huck for converting his videotapes. The Petition alleged that Mr. Jones had possession of twenty (20) videotapes which lawfully came into his possession during investigation of a client's claim for damages, and that such videotapes constituted evidence in the *Huck v. Berry* case. The Petition further alleged the competing demands for possession of the videotapes which had been received. The Petition in Interpleader made clear that Ms. Huck and Ms. McKinley claimed no ownership interest in the videotapes, but did have an interest in their being preserved as evidence for use in their damage actions. The Petition alleged that Mr. Jones, Ms. Huck and Ms. McKinley were subject to multiple and potentially inconsistent liabilities as a result of the competing demands for the tapes, and requested an Order that they be allowed to tender the videotapes into court and be discharged from any further liability in connection with their possession.

Secondly, the Petition requested that the trial court order the interpleader defendants and other interested parties to implead their claims for possession or ownership of the videotapes, and that the court then finally determine who was entitled to the videotapes, but maintain copies of the videotapes for trial in connection with the damage suits.

In his answer to the Petition, Mr. Berry admitted his demand to Mr. Jones seeking the return of videotapes which were or are his property. In his Answer, Mr. Berry made no allegations that the interpleader was a vehicle to unlawfully circumvent his right to a jury trial on a fact issue crucial to imposing liability in the civil damage actions (precisely the claim he now makes three years later. (Mr. Berry's Brief, p. 11).

On March 19, 1991, Glenda Jean Turner, who was originally a co-plaintiff with Ms. Huck and Ms. McKinley in the interpleader action, filed her Voluntary Dismissal Without Prejudice. On or about April 2, 1991, the Circuit Clerk of St. Charles County on her own initiative made a docket entry, that on the parties' stipulation, the cause was ordered dismissed without prejudice at Mr. Berry's cost. Apparently, the clerk mistakenly interpreted Ms. Turner's voluntary dismissal as a stipulation to dismiss the entire action as to all four plaintiffs. While the dismissal docket entry purported to assess costs against Mr. Berry, the court record does not contain any indication that Mr. Berry has ever paid any costs in that action. Plaintiffs paid the costs of service of process when the interpleader suit was filed, so presumably there are no costs outstanding in that action.

On September 12, 1991, Mr. Jones filed a Motion of Plaintiff for Relief of Order and To Reopen Case, seeking to correct the clerk's clerical error in dismissing the case and to have the interpleader case reopened. The same day Mr. Jones filed a Notice of Hearing seeking to call up his Motion In Interpleader on Friday, September 20, 1991. On September 19, 1991, Mr. Berry filed his Notice of Removal to Federal Court. That Notice of Removal was filed approximately one and one-half years after the original filing of the interpleader action, and approximately six months after the clerk's docket entry of dismissal which Mr. Berry now contends somehow constituted a violation of his civil rights.

### D. *Berry v. Hannah* and *Berry v. Boggs*

On November 2, 1990, Mr. Berry filed suit against William J. Hannah, the Prosecuting Attorney of St. Charles County, in the United States District Court for the Eastern District of Missouri, and against numerous unnamed "Doe" defendants (*Berry v. Hannah*). On November 20, 1990, Mr. Berry filed his dismissal of that action with prejudice.

Recently, Mr. Berry has filed an action against numerous other defendants, including all of the plaintiffs in the civil damage actions, their attorneys, certain St. Charles County deputy sheriffs and others, styled *Berry v. Boggs. et al.* The allegations of *Berry v. Hannah* and *Berry v. Boggs* include all of the same claims of a "racially-motivated misuse of state court civil procedures and criminal prosecuting authority by private litigants and their attorneys working in concert with state actors" and a conspiracy to achieve an "economic-lynching of a uniquely American cultural icon. . . ." which are made here. Yet, *Berry v. Hannah* was dismissed with prejudice approximately nine months prior to Mr. Berry seeking to remove any of the state court damage cases or the interpleader case to federal court.

**E. The State's Prosecution of Mr. Berry**

Mr. Berry's brief contains many statements and complaints about the institution of criminal charges against him resulting from a "raid" on his residence in June 1990. One result of that "raid" was that Mr. Berry was found guilty and convicted of the Class A misdemeanor of possession of a controlled substance, *i.e.*, marijuana in violation of R.S. Mo.§§ 558.011.1(5) and 560.016.

Mr. Berry in his deposition, admitted that he had previously been convicted of the felonies of armed robbery, violation of the Mann Act and income tax evasion.

## SUMMARY OF ARGUMENT

The remand orders entered by the district court were decided correctly as a matter of law. The district court correctly ruled that Mr. Berry had not pleaded in his removal papers a violation of any law "providing for specific civil rights stated in terms of racial equality." Mr. Berry's allegations of violations of his right to equal protection of the laws as guaranteed by the Fourteenth Amendment

and of 42 U.S.C. § 1985(3) invoke only laws that confer equal rights upon all citizens. Such violations, even if they existed, would not support removal under § 1443(1).

Similarly, Mr. Berry's allegations of racially-motivated judicial misconduct are insufficient to invoke removal. The controlling Supreme Court cases hold that state officials' actions must be pursuant to some explicit state law or statute to invoke removal under § 1443. Mr. Berry fails to allege that any state statute or law compels or mandates the misconduct he alleges. Rather, Mr. Berry improperly requests this Court to engage in the "unseemly process of prejudging their brethren of the state courts." *Georgia v. Rachel*, 384 U.S. 780, 803-04 (1966).

There is an independent basis for affirming the district court's remand orders, in that the court records below in *Huck v. Berry* and *Jones v. Berry* unequivocally establish that Mr. Berry's petitions for removal in those two cases were untimely under 28 U.S.C. § 1446.

Mr. Berry's allegations that the Missouri workers' compensation law provides an exclusive remedy for Ms. Huck and Ms. McKinley's injuries, and that the overruling of his Motion to Dismiss for Lack of Subject Matter Jurisdiction in the state court resulted from race discrimination lacks any legal or factual support. Ms. Huck and Ms. McKinley do not allege in their petition that Mr. Berry was their employer, so the Missouri workers' compensation law provides him no protection from civil suit. Furthermore, the Missouri workers' compensation law does not even apply to the type of intentional, outrageous conduct alleged in *Huck v. Berry*.

Mr. Berry's claim that he will be subjected to an unconstitutional award of punitive damages is pure speculation at this time. Under controlling Supreme Court precedent, it is

presumed that the state court will exercise its discretion properly to protect a litigant's rights.

Finally, the factual allegations raised by Mr. Berry concerning unfair treatment by the Circuit Court of St. Charles County, Missouri are not supported by the record. Ms. Huck and Ms. McKinley will demonstrate that Mr. Berry and his counsel have richly deserved any adverse rulings rendered against them in the state courts. There is not one iota of evidence that any sanctions ruling in *Huck v. Berry* or *Jones v. Berry* was the result of racial animus.

## REASONS FOR DENYING THE WRIT

### I.

### MR. BERRY'S ALLEGATIONS THAT STATE COURT DAMAGE ACTIONS FOR INVASION OF PRIVACY HAVE VIOLATED HIS RIGHTS GUARANTEED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND 42 U.S.C. § 1985(3) DO NOT INVOKE LAWS PROVIDING FOR EQUAL CIVIL RIGHTS FOR PURPOSES OF REMOVAL UNDER THE CIVIL RIGHTS REMOVAL ACT, 28 U.S.C. § 1443(1), BECAUSE UNDER SETTLED CASE LAW, NEITHER THE FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE NOR 42 U.S.C. § 1985(3) IS A LAW PROVIDING FOR SPECIFIC CIVIL RIGHTS STATED IN TERMS OF RACIAL EQUALITY.

On appeal, Mr. Berry relies upon only two provisions of law to support removal: the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1985(3). He claims that since he cannot enforce his civil rights guaranteed to him as a citizen under these provisions in the

Missouri state courts, removal is proper under 28 U.S.C. § 1443(1). His argument is wrong in all respects.

In *Georgia v. Rachel,* 384 U.S. 780, 788 (1966), this Honorable Court held that a defendant seeking to remove under 28 U.S.C. § 1443(1) must show two elements: (1) that the right upon which they rely is a "right under any law providing for . . . equal civil rights," *id.* at 788, and more specifically a law "providing for specific civil rights stated in terms of racial equality." *id.* at 792; and (2) that they are "denied or cannot enforce" those rights in the state court. *Id.* at 788. Mr. Berry can meet neither test.

In *Rachel,* the Supreme Court specifically rejected the argument that removal would be proper merely by invoking the protection of various facially-neutral constitutional provisions. The Court stated:

> We conclude that the phrase "any law providing for . . . equal civil rights" must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus, the defendant's broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under § 1443, because the guaranties of those clauses are phrased in terms of general application available to all persons who are citizens, rather than in the specific language of racial equality that § 1443 demands.

*Id.* at 792. In *Rachel*, this Court found removal proper because the defendants had alleged violations of specific provisions of the Civil Rights Act of 1964, which provide specific civil rights stated in terms of racial equality. Removal in *Rachel* was proper because the defendants "did not rely solely on . . . broad constitutional

claims in their removal petition." *Id.* Thus, the Supreme Court has explicitly found that a right to removal must be based on a specific law such as the Civil Rights Act of 1964, rather than on general laws "of which the Due Process Clause and 42 U.S.C. § 1983 are sufficient examples, that confer equal rights in the sense vital to our way of life, of bestowing them upon all." *Id.* at 792.

In comparison, Mr. Berry makes only broad conclusory allegations about denials of constitutional protection without citing any specific law stating protection in terms of racial equality. Mr. Berry's reliance on 42 U.S.C. § 1985(3) does not meet the *Rachel* test, and does not allow removal. That law is also one of general applicability; it does not specifically refer to racial equality. Mr. Berry's reliance on *Griffin v. Breckenridge*, 403 U.S. 88 (1971) for the proposition that § 1985 would support removal is misplaced. *Griffin* specifically noted that to state a claim for violation of § 1985 the complaint *must* aver "some racial, *or perhaps class-based*, invidiously discriminatory animus behind the conspirator's actions." *Id.* at 102 (emphasis added). Thus, § 1985 provides protection to victims of *any* class-based conspiracies, which could include, but which are certainly not limited to, conspiracies based solely on race. Therefore, removal is not proper under 28 U.S.C. § 1443(1) based on alleged violations of 42 U.S.C. § 1985. Even assuming Mr. Berry could prove his outrageous accusations, the statutes do not grant a right to remove these cases.

The cases cited by Mr. Berry to support his claim that alleged violations of the Fourteenth Amendment Equal Protection Clause allow removal simply do not apply. First, we again note that the Fourteenth Amendment provides equal rights to all citizens, not just protection against racial discrimination. *Georgia v. Rachel*, 384 U.S. 780, 792 (1966); *Sullivan v. State of Missouri*, 588 F.2d 579, 580 (8th Cir. 1978).

Secondly, Mr. Berry cites *Dodd v. Rue*, 478 F. Supp. 975, 977

(S. D. Ohio 1979) and *Greenberg v. Veteran*, 889 F.2d 418 (2d Cir. 1989) as support for his claim that the Fourteenth Amendment Equal Protection Clause is a law providing equal rights for purposes of removal under 28 U.S.C. § 1443(1). These cases do not even deal with § 1443(1). Rather, they analyze removal under § 1443(2), a statute not relied upon nor cited by Mr. Berry in his brief.

As a matter of law, Mr. Berry has not alleged any violation of a law providing specific civil rights stated in terms of racial equality, and his petitions for removal in *Huck v. Berry* and *Jones v. Berry* therefore fail to state any claim upon which relief could be granted. The district court's order of remand was proper, and the Petition for Writ of Certiorari should be denied.

## II.

**MR. BERRY'S ALLEGATION OF A PATTERN OF RACIALLY-MOTIVATED ACTIONS DURING THE COURSE OF STATE COURT CRIMINAL AND CIVIL PROCEEDINGS PROVIDES NO BASIS FOR INVOKING THE CIVIL RIGHTS REMOVAL ACT, 28 U.S.C. § 1443(1) TO REMOVE STATE COURT DAMAGE ACTIONS TO FEDERAL COURT, IN THAT CONTROLLING PRECEDENT OF THIS COURT HOLDS THAT STATE OFFICIALS' ACTIONS MUST BE PURSUANT TO SOME EXPLICIT STATE LAW OR STATUTE TO INVOKE REMOVAL UNDER § 1443, AND MR. BERRY FAILS TO ALLEGE THAT ANY MISSOURI STATUTE OR LAW COMPELS OR MANDATES THE MISCONDUCT HE ALLEGES. TO ALLOW REMOVAL, THIS COURT WOULD HAVE TO ENGAGE IN THE "UNSEEMLY PROCESS OF PREJUDGING THEIR BRETHREN OF THE STATE COURTS." *GEORGIA V. RACHEL*, 384 U.S. 803-04 (1966).**

Mr. Berry's second assertion is that the state judiciary and/or

state prosecutor have engaged in a pattern of racially discriminatory misconduct toward him in the state court proceedings. Even if his wild allegations were true, these are insufficient grounds for removal under 28 U.S.C. § 1443(1) for at least two reasons.

First, Mr. Berry's claim fails the second prong of the two-part test set forth in *Georgia v. Rachel*, 384 U.S. 780, 788 (1966). His unsupported, speculative contention that he will in the future be denied a fair trial in state court is not a sufficient ground for removal. *Greenwood v. Peacock*, 384 U.S. 808, 827-828 (1966); *Sullivan v. State of Missouri*, 588 F.2d 579, 580 (8th Cir. 1978). The federal courts do not engage "in the unseemly process of prejudging their brethren of the state court." *Georgia v. Rachel*, 384 U.S. at 803-04. As noted by this Court in *Greenwood v. Peacock*, 384 U.S. at 956-957:

> It is not enough to support removal under § 1443(1) to allege or show that the defendants' federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be "denied or cannot enforce in the courts" of the state any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial.

The second flaw in Mr. Berry's argument concerning prosecutorial and judicial misconduct is that there is no showing that these state officials have been acting pursuant to a specific state law or statute. *Georgia v. Rachel*, 384 U.S. at 798. This Court in *Rachel* found a presumption that the state court will act in a proper manner, unless the defendant can show some specific state statute or law which provides an impediment to the enforcement of his federal constitutional rights. No such showing has been made here. As noted in *Rachel*:

> Removal is not warranted by an assertion that a denial or rights of equality may take place and go uncorrected at trial. Removal is warranted only if it can be predicted *by reference to a law of general application* that the defendant will be denied or cannot enforce the specified federal rights in the state courts.

384 U.S. at 800 (emphasis added).

Here, Mr. Berry has not shown any Missouri statute or constitutional provision which places any impediment to him enforcing his federal constitutional rights in the state court. His unsupported allegations that the state court judges have erred at all, and that such alleged errors are the result of racial animus, simply do not suffice for purposes of § 1443.

Mr. Berry also argues that the mere institution of a state court proceeding, if motivated by racial animus, is sufficient to support removal under § 1443 even if the state law invoked is racially-neutral. Neither *Georgia v. Rachel, supra*, nor *Sofarelli v. Pinellas County*, 931 F.2d 718 (11th Cir. 1991) support Mr. Berry's position. In *Rachel*, the institution of a trespass prosecution under Georgia state laws clearly implicated the defendants' *specific* federal rights under the Civil Rights Act of 1964. 384 U.S. at 804-805. In

*Sofarelli*, the state court injunction suit impacted the *specific* federal rights guaranteed by the Fair Housing Act, 42 U.S.C. § 3604.

In contrast, Mr. Berry's allegations of judicial misconduct here provide no "firm prediction" that any specific federal rights of Mr. Berry will be implicated. First, no state law has been identified which requires the alleged misconduct. Secondly, it is pure speculation by Mr. Berry at this point in time that he cannot receive a fair trial in the state courts of St. Charles County. Third, he is unable to predict that any specific federal right provided by a loss stated in specific terms of racial equality will ever be implicated here.

Finally, and perhaps most importantly, Mr. Berry's allegations of judicial misconduct in *Huck v. Berry, Jones v. Berry* and *Berry v. Jones and Huck* are flatly contradicted by the records in the state court. First, overruling of Mr. Berry's Motion to Dismiss *Huck v. Berry* for lack of subject matter jurisdiction on the grounds that the workers' compensation law provided an exclusive remedy, was an absolutely correct application of Missouri law. The most glaring flaw in Mr. Berry's argument about the workers' compensation law exclusive remedy doctrine is that Ms. Huck and Ms. McKinley in their Second Amended Petition did not even allege that Mr. Berry was their employer. Rather, they alleged that they were employed by defendant Chuck Berry Communication Systems, Inc. and/or defendant Francine Gilliam. Under Missouri law, Mr. Berry as the sole or a majority shareholder of Chuck Berry Communications Systems, Inc. is not treated as an employer, but rather is considered a co-employee of the plaintiffs, negating any claim that the workers' compensation law should bar their causes of action against him. *Craft v. Scaman*, 715 S.W.2d 531, 538 (Mo. App. 1986) (president and principal shareholder of a corporation was liable to an injured employee in a common law tort action as a co-employee). *See also, Rhodes v. Rogers*, 675 S.W.2d 107, 108 (Mo. App. 1984).

Secondly, Mr. Berry's assertion that Missouri law provides that the workers' compensation law is an exclusive remedy for the types of intentional invasion of privacy claims asserted by Ms. Huck and Ms. McKinley is flatly wrong. Missouri courts have held that where "an employer acts intentionally and it is substantially certain that injury to an employee will result, the employer has a specific purpose to inflict injury and therefore the conduct is actionable as being an exception to the exclusivity provision of the Workers' Compensation statutes . . ." *Speck v. Union Electric Co.*, 741 S.W.2d 280, 283 (Mo. App. 1987); *McCoy v. Liberty Foundry Co.*, 635 S.W.2d 60 (Mo. App. 1982). Ms. Huck and Ms. McKinley allege that Mr. Berry and his corporation engaged in deliberate and intentional tortious conduct toward them by surreptitiously videotaping their most private activities, which would be offensive to any decent person in the community. The alleged tortious conduct was so far outside the bounds of decency that it is ludicrous to suggest that the drafters of Missouri's workers' compensation law would have contemplated providing the protection of the Act to these defendants. Under Missouri law, there is simply no basis for stating that the type of injuries to their privacy and the humiliation suffered by Ms. Huck and Ms. McKinley were a natural and reasonable incident of their employment or a rational consequence of some hazard related to their work. *Pryor v. United States Gypsum Co.*, 585 F. Supp. 311 (W. D. Mo. 1984).

At the very least, the question of the applicability of the workers' compensation law is one upon which reasonable judicial minds could differ. The circuit judge's ruling denying Mr. Berry's Motion to Dismiss cannot under any stretch of the imagination be categorized as obviously wrong or an intentional misapplication of the law. There is no basis in the court record for a finding, or even a suggestion that the circuit judge ruled on the basis of racial bias. His ruling is supported by ample judicial authority and is a correct statement of Missouri law.

In their summary of the case, respondents have detailed the history of the sanctions orders entered against Mr. Berry and his counsel in the state courts. The procedural history underlying those orders demonstrates that they were entered as a result of Mr. Berry's refusal to comply with discovery Orders, and his interference with the investigative and discovery efforts of the plaintiffs in the state court damage actions against him. Under any standard, the sanctions Order for Mr. Berry's refusal to comply with discovery Orders was not an abuse of discretion. The second sanctions Order in *Berry v. Huck and Jones* was equally well-deserved. It came only after Ms. Huck established on the record that Mr. Berry's counsel had deliberately and intentionally instructed a properly subpoenaed non-party witness not to appear for her deposition. Coming directly on the heels of the previous fiasco of delay and hindrance relating to the interrogatory answers, the trial court had every right to impose a monetary sanction against Mr. Berry and his attorney to defray the costs, expenses and attorneys' fees incurred by Ms. Huck due to their actions. That Order could not possibly be found an abuse of discretion.

Finally, Mr. Berry's complaints that the interpleader action filed by Mr. Jones and Ms. Huck was a legal maneuver to violate his civil rights is simply preposterous. That interpleader action was filed approximately one week after Mr. Berry sued Mr. Jones and Ms. Huck claiming that they had converted *his* video tapes. The interpleader plaintiffs sought only to deposit those videotapes in court, to relieve Mr. Jones, Ms. Huck and Ms. McKinley from any liability for possession of those tapes, and ultimately to obtain a court ruling as to who was lawfully entitled to possession of the tapes. This was a proper and appropriate legal procedure which has no impact whatsoever on Mr. Berry's equal protection rights.

Far from showing a "firm prediction" that Mr. Berry would be denied a fair trial in Missouri state courts, the record in these cases shows a continual pattern of avoidance of discovery obligations

and delay which has exasperated at least three Missouri state court judges and one federal district judge sufficiently that they imposed sanction against Mr. Berry and his counsel. Mr. Berry's claims of judicial misconduct fail as a basis for removal, in that he has not shown that any state officials he accuses were acting pursuant to any state law or statute, and his "firm prediction" that he will be denied a fair trial is absolute speculation at this point. Accordingly, the district court properly remanded these cases and the Petition for Certiorari should be denied.

## III.

## THE RECORD BEFORE THE DISTRICT COURT AND THE EIGHTH CIRCUIT CONCLUSIVELY ESTABLISHES THAT THE SANCTION ORDERS ENTERED AGAINST MR. BERRY AND HIS COUNSEL IN THE STATE COURT PROCEEDINGS WERE RICHLY DESERVED DUE TO HIS CONTUMACEOUS AND DELIBERATE REFUSAL TO COMPLY WITH DISCOVERY ORDERS AND HIS DELIBERATE EFFORTS TO DELAY THE STATE COURT DAMAGE CASES AGAINST HIM. THEREFORE, THIS CASE IS FACTUALLY INAPPROPRIATE FOR THIS COURT TO EXERCISE ITS DISCRETION TO REVIEW THE ABSTRACT QUESTIONS OF LAW PRESENTED IN PETITIONER'S BRIEF.

As noted above, the procedural history underlying the various sanction Orders entered against Mr. Berry and his counsel in the courts below demonstrates that those Orders were entered not as a result of any judicial bias or racial animus against Mr. Berry, but as a result of his and his attorney's own conduct. The sanctions were entered only after repeated failures to comply with explicit discovery Orders, and after Mr. Berry's counsel intentionally directed a properly subpoenaed non-party witness not to appear for her properly-noticed deposition.

Furthermore, Mr. Berry's brief fails to advise this Court of the numerous instances, noted in respondents' Statement of the Case above, where Mr. Berry received favorable rulings from the same state circuit court judges he now accuses of conspiring against him.

It should also be noted that there is an independent basis for remand of these actions which was presented to but not relied upon by the district courts or the Eighth Circuit Court of Appeals. In both *Huck v. Berry* and *Jones v. Berry*, Mr. Berry's petitions for removal were untimely under 28 U.S.C. § 1446, because the petitions were not filed within thirty days after Mr. Berry's receipt of any amended pleading or paper from which it could first be ascertained that the case was removable.

28 U.S.C. § 1446 provides that a notice of removal in a civil action must be filed within thirty days after defendant receives a copy of the initial pleading setting forth a claim for relief, or within thirty days after defendant receives a copy of an amended pleading, motion, order or other paper "from which it may first be ascertained that the case is one which is or has become removable. . . ."

It is clear that the notices of removal in *Huck v. Berry* and *Jones v. Berry* were not filed within thirty days after service of process. The original Petition in *Huck v. Berry* was filed December 26, 1989, and served on Mr. Berry January 12, 1990. The Second Amended Petition in *Huck v. Berry* was filed December 7, 1990. The Notice of Removal in *Huck v. Berry* was not filed until August 2, 1991.

In *Jones v. Berry* the Petition in Interpleader was filed May 3, 1990 and served on Mr. Berry on May 11, 1990. The Notice of Removal was not filed until September 19, 1991.

Clearly, both Notices of Removal were untimely under the first paragraph of § 1446(b). They were also untimely under the

second paragraph of § 1446 (b), providing for amended pleadings which first set forth a basis for removal.

In *Huck v. Berry*, the state court's docket sheets revealed that there were no pleadings filed, rulings or activities of any kind in that action between April 19, 1991 and the filing of Mr. Berry's Notice of Removal on August 2, 1991. Thus, the *Huck v. Berry* Petition for Removal was filed at least four months after the filing of the last preceding papers in the circuit court.

In *Jones v. Berry* the only activity within thirty days of the filing of Mr. Berry's Notice of Removal was the filing by Mr. Jones on September 12, 1991 of a Motion of Plaintiff for Relief of Order and to Reopen Case, seeking to correct the circuit clerk's clerical error in dismissing the case, and a Notice of Hearing seeking to call up the Motion in Interpleader for Friday, September 20, 1991 .

Mr. Berry does not allege, and there is no possible basis for finding that Mr. Jones' Motion for Relief of Order And To Reopen Case and Notice of Hearing were papers "from which it may first be ascertained that the case is one which is or has become removable . . ." 28 U.S.C. § 1446(b). In light of all of Mr. Berry's accusations about the conspiracy against him, he has known of all the purported civil rights issues for well over a year before filing his Notice of Removal in *Jones v. Berry*. First, his brief and notices of removal make repeated references to various alleged civil rights violations that occurred in the summer of 1990. Then, in November 1990, Mr. Berry filed suit against William Hannah, the Prosecuting Attorney of St. Charles County, in federal court, alleging numerous civil rights violations and on November 20, 1990 Mr. Berry dismissed that action with prejudice. Next, Mr. Berry filed his notices of removal based on the alleged civil rights violations in *Huck v. Berry* and the other state court personal injury cases on August 2, 1991. More than thirty days after that date, he filed his Notice of Removal in the *Jones v. Berry* interpleader action on September 19, 1991.

Giving Mr. Berry the benefit of every possible doubt, his time for filing and Notice of Removal in *Jones v. Berry* expired by September 2, 1991. Mr. Jones' filing of the Motion to Reopen the case, and a simple Notice of Hearing did not create any of the alleged civil rights violations of which Mr. Berry complains, nor did it first alert Mr. Berry to the existence of those alleged violations.

Missouri courts have held that the time limit for removal is mandatory, and a timely objection to a late petition for removal must result in remand. *St. Louis Home Insulators v. Burroughs*, 597 F. Supp. 98 (E. D. Mo. 1984); *Rampy v. Southwestern Bell Telephone Co.*, 615 F. Supp. 996 (E. D. Mo. 1985).

Even if this Court believes that the abstract questions of law set forth in Mr. Berry's brief have some merit, this is not an appropriate case factually to justify certiorari. The simple fact is there is no support for Mr. Berry's fanciful allegations in the court records below. The state court damage actions were correctly remanded, and this Court should not utilize its precious time and resources on this case. The Petition for Certiorari should be denied.

## CONCLUSION

The only pattern disclosed by the records in the courts below is a pattern of delay by Mr. Berry in the state court damage actions. Settled Supreme Court precedent establishes that there is no legal basis for removal of these actions. The strong inference from the entire record is that the filing of the notices of removal in the first place, the appeal to the Eighth Circuit and this Petition for Certiorari are all part of Mr. Berry's calculated process of delaying and hindering the progress of the state court cases against him. *Huck v. Berry* has been pending for three years, with no trial setting in sight. The relatively simple interpleader case has been pending two and one-half years, and plaintiffs have been unable even to

obtain a ruling from the state court on the threshold question of whether they may interplead the videotapes into court.

Ms. Huck and Ms. McKinley respectfully request this Court to see this purported removal for what it is, to put a stop to the delay by quickly denying the Petition for Certiorari, and to grant them such additional relief as this Court deems appropriate under the circumstances.

Respectfully submitted,

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Supreme Court, U.S.
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No. 92-883

In The

# Supreme Court of the United States

October Term, 1992

CHARLES E. BERRY,

*Petitioner,*

*vs.*

A. DOE, J. DOE, HOSANA A. HUCK, MARIANNE McKINLEY, REBECCA PRICE, and NANCY CRAWFORD and MELISSA WALKER as Representative Parties on Behalf of a Definable Class,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## REPLY BRIEF FOR PETITIONER

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**APPENDIX**

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## SUPPLEMENTAL STATEMENT OF THE CASE

In only one of these five damage suits removed under the Civil Rights Removal Act, 28 U.S.C. § 1443(1), have the Respondents opposed issuance of the Writ of Certiorari. Respondents Huck and McKinley's Brief in Opposition to the Petition in its own right is sufficient reason to grant the Petition. Their argument that the Equal Protection Clause of the Fourteenth Amendment and the Ku Klux Klan Act, 42 U.S.C. § 1985(3), are not laws providing for specific civil rights stated in terms of racial equality is devoid of reason. Their second principal argument, that a § 1443(1) removal is not proper unless the defendant has been deprived of equal civil rights by reason of a discriminatory state enactment, crystallizes why the Petition should be granted. That argument was adopted by the district court and uncritically affirmed *per curiam* by the Eighth Circuit, 967 F.2d 1255 (1992), even though it was directly contrary to the holding in *Georgia v. Rachel*, 384 U.S. 780, 804 (1966). Certiorari should issue to correct this conflict created by the Eighth Circuit's ruling.

Respondents' allegation at pages 24-26 of their Brief that Petitioner's notices of removal were untimely merit no consideration. As Respondents concede, neither the district court nor the Eighth Circuit discussed, much less ruled on that claim. Therefore, it is not ripe for the Court.

Respondents include factual arguments about an interpleader case involving ownership of videotapes which are the subject of actions for punitive damages against Petitioner. *See* Respondents' Brief at 9-11. Certiorari was not sought on the interpleader case because Respondents finally produced the videotapes in Mr. Berry's federal civil rights action. Thus, there are only five cases before the Court, not six as Respondents state.

## I.

## THE EQUAL PROTECTION CLAUSE AND 42 U.S.C. § 1985(3), INVOKED BY PETITIONER ON REMOVAL, ARE LAWS PROVIDING FOR EQUAL CIVIL RIGHTS STATED IN TERMS OF RACIAL EQUALITY UNDER THE CIVIL RIGHTS REMOVAL ACT.

Nothing in this Court's jurisprudence supports the vapid proposition advocated by Respondents that to justify a § 1443(1) removal the rights denied must arise under a federal law that proscribes only race discrimination. *See* Respondents' Brief at 15-17. Indeed, the Court in *Rachel* held the Civil Rights Act of 1964 was a law that provided for civil rights in terms of racial equality. 384 U.S. at 792-93. Section 201(a) also prohibits religious and national origin discrimination. 42 U.S.C. § 2000(a). Moreover, the Court has recognized other statutes, such as 42 U.S.C. §§ 1971 and 1981, not limited to redressing only race discrimination, as proper bases for § 1443(1) removal. *Greenwood v. Peacock*, 384 U.S. 808, 825 (1966). Laws which at least in part prohibit racial discrimination, including the Fourteenth Amendment Equal Protection Clause and § 1985(3) invoked by Petitioner satisfy the first prong of the *Rachel* test. The Eighth Circuit's decision flatly rejecting them as a basis for § 1443(1) removal clearly is contrary to the import of this Court's rulings in *Rachel* and *Peacock*.

On removal Petitioner made interrelated allegations that the concerted actions of state police, prosecutorial and judicial officials as well as private litigants and their attorneys violated his rights to be free from racially discriminatory state actions (prohibited by the Fourteenth Amendment Equal Protection Clause) and private/official conspiracies motivated by racial animus (violating § 1985(3)). Petitioner pleaded violations of both the deprivation and the prevention or hindrance clauses of § 1985(3). *See* Appendix (Complaint in federal case incorporated into Notices of Removal of state court actions).

The Court's decision in *Bray v. Alexandria Women's Health Clinic*, No. 90-985, 61 U.S.L.W. 4080 (U.S. Jan. 13, 1993) refutes absolutely Respondents' arguments that § 1985(3) does not specifically relate to racial equality. *Bray* reaffirmed the teaching of *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) that § 1985(3) was enacted with a view to prohibiting conspiracies animated by racial discrimination. *Bray*, 61 U.S.L.W. at 4081, 4085. Here the Eighth Circuit's summary affirmance of the district court's ruling that a "race-oriented economic lynching", 967 F.2d at 1256, does not suffice for removal was contrary to the congressional intent behind § 1443.[1]

That no substance supports the Eighth Circuit's decision is revealed by Respondents' amazing claim that the Equal Protection Clause is not a law providing for equal civil rights under § 1443(1). The Court long ago held that violation of a removing party's right to be free from racial discrimination guaranteed by the Equal Protection Clause properly invoked federal court jurisdiction. *Strauder v. West Virginia*, 100 U.S. 303, 311-12 (1879) (cited at page 15 of the Petition). Respondents do not claim *Strauder* is no longer good law, but lamely attempt to distinguish authorities not even cited by Berry in his Petition. *See* Respondent's Brief at 16-17. *Strauder* was cited in *Shelley v. Kraemer*, 334 U.S. 1, 16 (1948) as part of a body of jurisprudence in which the Court recognized that state action in violation of the Fourteenth Amendment "is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute". *Accord Palmore v. Sidoti*, 466 U.S. 429 (1984) (citing *Shelley* and *Strauder*).

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1. The Civil Rights Removal Act (first version enacted in 1866) and the Ku Klux Klan Act (originating in 1871) were part and parcel of the Reconstruction-era legislation to enforce the then-new amendments to the Constitution, which had a principal purpose of eradicating slavery and racial discrimination. Respondents' argument that § 1985(3) does not specifically address racial equality ignores history.

Petitioner alleged on removal that the acts of state authorities including prosecutors, judges and sheriffs violated his rights to equal protection because they were motivated by racially discriminatory practices which caused him to be subjected to unlawful criminal procedures and irreparably destroyed his ability to mount an effective defense in state court against these punitive damages claims. *See* Appendix. Certiorari must issue to clarify that violations in state court proceedings of the equal protection right to be free from racially discriminatory practices provide a proper basis for § 1443 removal, whether that equal protection right is found in the Fourteenth Amendment or in the Ku Klux Klan Act.

## II.

## IN LIMITED INSTANCES UNEQUAL APPLICATION OF STATE LAW AND STATE PROCEDURES TO A REMOVING DEFENDANT FOR THE PURPOSE OF RACIAL DISCRIMINATION ARE GROUNDS FOR A CIVIL RIGHTS ACT REMOVAL.

Respondents engage in extensive argument on factual matters underlying Petitioner's removal papers, disagreeing [mostly] on the interpretation of certain events in the state criminal and civil proceedings against Mr. Berry. Respondents, however, do not deny that the St. Charles County police authorities raided Mr. Berry's estate ostensibly for evidence of cocaine trafficking and child pornography (none was found). Neither do they deny that the raid was based on false information about Petitioner given to police and judicial authorities by Respondent Hosana Huck's husband; nor that the police and prosecuting authorities held press conferences in which they intentionally lied to the St. Charles public that their raid had produced evidence of drug trafficking and child pornography by Petitioner; nor that amid wide publicity Petitioner was charged with three counts of felony child abuse based on videotapes given to St. Charles prosecutors by

Respondent Huck's husband (who got those tapes from Respondent's attorneys); nor that in the course of that criminal prosecution a St. Charles prosecutor said about Petitioner: "One way or another we're going to get that nigger"; nor that the felony child abuse charges were dropped without Petitioner arguing even one motion; nor that the county judge who denied Petitioner's motion to dismiss Respondents' civil tort claims for workers compensation preemption should have disqualified himself; nor that the same judge had a long-running romantic relationship with one of the class-action plaintiffs in another removed case against Petitioner making the same allegations; nor that the same judge viewed in his home without knowledge of Petitioner's attorneys videotapes on which the Respondents' claims are based; nor that the county judges who imposed monetary sanctions on Petitioner and counsel should have disqualified themselves because they were the father and uncle of one of the attorneys for some of the class-action plaintiffs. Nor do they deny that the judge who approved the search warrant for the raid, having chosen to believe the obvious lies about Petitioner, first refused to disqualify himself and then ruled against Petitioner in the tort litigation, but later disqualified himself when he acknowledged the conflict.[2] For the purposes of ruling on this Petition his claims must be taken as true since the district court refused Petitioner's request to hold an evidentiary hearing. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) and cases cited in Petition at 13. Thus Respondents' disagreement about certain facts pleaded on removal are of no import at this stage.

The real issue before the Court is: May the combined acts of prosecutorial, judicial and police authorities acting in concert with private litigants and their attorneys in interrelated criminal and civil proceedings taken for the purpose of discriminating against a

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2. Respondents attempt to bolster their arguments by noting at page 1 of their Brief that Petitioner has not sued any state court judges. For good reason, *Mireles v. Waco*, 112 S. Ct. 286 (1991), he has not done so.

prominent African-American because of his race and to destroy him financially justify a § 1443(1) removal?

Respondents advocate a rule that reduced to its essence would never permit a § 1443(1) removal unless the defendant could point to a specific state law that would mandate racially discriminatory actions. Under Respondents' rule only in the face of such a Jim Crow legislative mandate could one "predict" that a defendant would be denied or could not enforce "specific" federal rights in terms of racial equality. *See* Respondents' Brief at 18-20. Their crabbed view of § 1443(1) is not required by the Court's precedents. First, *Rachel* upheld removal of a state prosecution under a racially neutral law because the purpose of the prosecution was racial discrimination. Second, § 1985(3), as well as the Equal Protection Clause of the Fourteenth Amendment, provides for "specific" federal rights — *e.g.*, the right to be free from racial conspiracies which deprive persons of their equal civil rights and the right to be free from private acts which prevent state officials from protecting equal civil rights. Finally, there is no need to "predict" a violation of Chuck Berry's equal civil rights at this late date.

**A. Discriminatory State Enactment Is Not Required For Removal Under § 1443(1).**

The *Rachel* Court upheld removal of state criminal prosecutions under a racially neutral state trespass law because the prosecutions were undertaken for a racially discriminatory purpose. 384 U.S. at 804. Following *Rachel* the Sixth (*Conrad v. Robinson*, 871 F.2d 612 (1989)) and Eleventh (*Sofarelli v. Pinellas County*, 931 F.2d 718 (1991)) Circuits have upheld removals of state civil cases proceeding under racially neutral laws but filed for racially discriminatory purposes. If *Rachel* no longer is good law on this point it should be overruled, otherwise certiorari should issue to resolve the conflict created by the Eighth Circuit's ruling.

**B. Section 1985(3) Provides For "Specific" Federal Rights In Terms Of Racial Equality.**

At least one point on which all the opinions in *Bray v. Alexandria Women's Health Clinic, supra,* seemingly agree is that § 1985(3) protects the specific rights to be free from conspiracies (1) intended to deprive persons of equal protection of the laws and (2) intended to hinder or prevent state authorities from giving or securing to all persons the equal protection of the laws. *See Bray, supra,* 61 U.S.L.W. at 4083-84 (majority opinion), at 4087 (opinion of Justice Souter), at 4094 (opinion of Justice Stevens), and at 4105 (opinion of Justice O'Connor). Not decided in *Bray* was the scope of those rights. This Petition for Writ of Certiorari presents an apt decisional vehicle for those issues, as well as an appropriate opportunity to restate the continued vigor of § 1985(3).

Petitioner has alleged in his removal papers violations of both the first (deprivation) and second (hindrance) clauses of § 1985(3). Berry alleged that state police and prosecutorial officials conspired with private litigants (the Respondents) and their attorneys to deprive him of his right to equal protection of the laws on the basis of his race. Petitioner alleged that the acts of Respondents and their attorneys so corrupted the administration of justice by the St. Charles County court system as to deprive him of equal protection of the laws, thereby implicating the hindrance clause. *See Bray, supra,* 61 U.S.L.W. at 4090 (Opinion of Justice Souter) for highly germane observations about "exercises of state authority by conspiratorial usurpation."

**C. Petitioner Already Has Been Deprived Of His Rights To Equal Protection Of The Laws In The Course Of The Interrelated Criminal And Civil Prosecutions.**

In one of their most glaring examples of denying Petitioner equal protection of the laws on the basis of his race, the St. Charles County courts refused to dismiss any of the claims against him despite Mr. Berry's invocation of the exclusivity defense of

Missouri Workers Compensation law. Respondents clearly alleged in their petition that Mr. Berry was their actual legal "employer" at the Southern Aire Restaurant where they allegedly were filmed while using restroom facilities.[3] Mr. Berry moved to dismiss on the basis that the Missouri Workers Compensation law, R.S. Mo. Chapter 287, was the exclusive remedy for employees allegedly suffering personal injuries arising out of the course and scope of their employment. That motion was denied by a St. Charles County judge who enjoyed a long-running relationship with one of the class-action plaintiffs suing Mr. Berry. That judge should have disqualified himself under Canon of Judicial Conduct 3(C), but his failure to do so was not the only violation of Petitioner's equal protection rights.

Without question, Missouri law required the dismissal of the damages claims by former employees of the Southern Aire Restaurant because of the workers' compensation defense. In *Zahn v. Associated Dry Goods Corp.*, 655 S.W. 2d 769 (Mo. App. 1983) the court held a woman's claim for personal injury damages suffered in an assault and rape that occurred in her employer's's parking garage was barred by the Missouri Workers' Compensation Act. More recently in *Crofts v. Harrison*, 772 S.W. 2d 901 (Mo. App. 1989), the female employee was working overtime when her supervisor sexually assaulted her at the employer's place of business. The court held "as a matter of law" that the sexual assault "arose 'out' of plaintiff's employment" and the court claim was barred. *Id.* at 904. *See also Russell v. U.P.S., Inc.*, 666 F.2d 1188, 1192 (8th Cir. 1981) (even for sexual assault producing intentional infliction of emotional distress, any tort claim against employer barred by Missouri Workers' Compensation Act). To the extent that Mr. Berry may have been only a "supervisory" employee of Respondents, and not their

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3. We refer the Court to Defendants-Appellants' Separate Appendix, Vol. I at pp. 148-49 and 198-99, filed in the Eighth Circuit.

employer (as Respondents now claim, contradicting their petition in state court), he shared in the same immunity provided to an employer under the Workers' Compensation Act. *State ex rel. Hartman v. Kintz*, 832 S.W. 2d 9 (Mo. App. 1992).

Mr. Berry was entitled to the equal benefit of Missouri law on the exclusivity of workers' compensation as a remedy for a sexual offense which occurs at work. As an employer, he stood in no different position than the employers in *Zahn*, *Crofts* and *Russell*. But because of his status as an African-American in an overwhelmingly White county defending claims by hundreds of White females for punitive damages, Petitioner was denied the equal protection of Missouri law.

Additionally, in his removing papers Petitioner alleged unequal and discriminatory application of pretrial sanctions against him in many instances by judges who had a blood relationship with one of the attorneys for some of the class action plaintiffs against Petitioner. Those specific instances of misconduct need not be detailed at this stage, but suffice it to say such actions continue to this day.[4]

A "prediction" that Berry's equal civil rights will be violated, *Rachel, supra*, is not necessary in this case. They have been, repeatedly. Unless the Court grants the Writ, trials on hundreds of claims in St. Charles County will follow with tainted juries, biased

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4. After remand was granted by the district court, but while this Petition for Writ of Certiorari was pending, the class-action tort case for punitive damages by hundreds of White females against Petitioner was certified under Missouri law to proceed as a class action. The circumstances of that certification were an outrage, *e.g.*, the state court took no testimony. And still more monetary sanctions have been imposed against Petitioner, this time because he requested that an inspection of his estate, where the raid occurred and already inspected by Respondents, take place when the media was not present. Berry's request to delay the inspection until a time when TV "news" crews would not be present was denied by the state court judge and he was sanctioned $1,472.00.

judges, and arbitrary procedures. It is not enough to say that Petitioner has a potential remedy on appeal in state court for the racially motivated discrimination. Respondents by then will have carried out successfully their racially motivated economic lynching.[5]

## CONCLUSION

The decisions below that the Ku Klux Klan Act is merely a law of general application are clearly wrong. Certiorari should issue to prevent such crippling misinterpretation of a major civil rights law from standing as precedent on this and other vital points. If the Court should not be disposed to grant this Petition yet, Petitioner urges that the Court seek the views of the Government on whether certiorari should issue. No civil removal cases under the 1964 Civil Rights Act has reached the Court. And no removal case has presented such an egregious discriminatory pattern by a state court. Full review by the Court is needed.

Respectfully submitted,

RICHARD E. SCHWARTZ
*Counsel of Record*
JAMES E. PARROT
RICHARD SCHWARTZ
&ASSOCIATES, LTD.
*Attorneys for Petitioner*

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5. Petitioner must address one last point raised in Respondents' Brief at page 23 where they falsely claim that Petitioner was sanctioned by "one federal district judge". Indeed, all the district judges handling the removal petitions denied Rule 11 sanctions. *See Crawford v. Berry*, No. 91-1597-C-3 (E.D. Mo., Feb. 21, 1992 Order at 3.)

## APPENDIX A — COMPLAINT IN *BERRY V. BOGGS* FILED IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED AUGUST 8, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No.
91-1586-C-2

Related to Cause No.
90-2084-C-4 (Judge Cahill)

CHARLES E. BERRY, a/k/a CHUCK BERRY and FRANCINE GILLIUM,

Plaintiffs,

v.

RONALD L. BOGGS, VINCENT J. HUCK, WILLIAM G. BOWMAN, STEVE ROACH, SHARON OAKLEY, RICH FEAGAN, ANN FEAGAN, JOHN E. PRICE, THOMAS F. JONES, HOSANA HUCK, a/k/a SUZY HUCK, TAMMY M. LIPP,

AND

DOES I through CC,

Defendants.

COMPLAINT FOR DAMAGES,
INJUNCTIVE AND DECLARATORY RELIEF

Come now plaintiffs Charles E. Berry a/k/a Chuck Berry and Francine Gillium and for their Complaint for Damages, Injunctive

and Declaratory Relief against defendants, and each of them, state as follows:

Introduction

1. This action is brought against defendants William G. Bowman, Steve Roach, and Sharon Oakley, all St. Charles County Sheriff's officers, deputies or employees, in their official and individual capacities, against defendants Vincent J. Huck and Rich Feagan in their personal capacities as well as in their official capacities to the extent they may have acted as police agents or otherwise under color of law, against defendant Ronald L. Boggs in his personal capacity and in his official capacity to the extent he may have acted as an agent for prosecutorial authorities or otherwise under color of state law, and against Ann Feagan, John E. Price, Thomas F. Jones, Hosana Huck a/k/a Suzie Huck, and Tammy M. Lipp in their personal capacities. All defendants named above are persons who conspired between and among themselves and with the former Prosecuting Attorney of St. Charles County, William J. Hannah, and other persons acting under color of state law to deprive plaintiffs of their constitutional rights and/or other persons seeking to deny to plaintiffs the equal protection of the laws. It seeks compensatory and punitive damages, a permanent injunction against defendants to halt further prosecution in the courts of St. Charles County, Missouri of certain civil suits against plaintiffs Berry and Gillium by defendants Boggs, Price, and Jones as attorneys, and all other named defendants as parties, investigators, or witnesses for the many constitutional reasons set forth below, as well as declaratory judgments that the Missouri law on punitive damages awards in civil cases under which defendants and their agents and co-conspirators are proceeding against plaintiffs Berry and Gillium is unconstitutional, at least as applied to plaintiffs Berry and Gillium; and that the racially-motivated actions of defendants and their co-conspirators and agents have

made it impossible for the constitutional rights of plaintiffs to be protected by the Missouri courts in the defense of certain civil actions now pending in the Circuit Court of St. Charles County, Missouri, (*see* Paragraphs 23, 33 *infra*), and that the Missouri laws under which defendants proceed against plaintiffs in state court are vague, overly broad, arbitrary, lack sufficient rational foundation, and are otherwise constitutionally defective, all for the reason that plaintiffs Berry and Gillium constitute a suspect classification for purposes of equal protection analysis.

2. In the 13 months before the filing of this Complaint, there were initiated, filed and prosecuted against defendant Berry maliciously baseless criminal charges in the Circuit Court of St. Charles County, Missouri, all filed in bad faith by the Prosecuting Attorney's office headed by William J. Hannah, against plaintiff Berry at the behest of and in collusion and conspiracy with all named defendants and/or defendants herein. *See State of Missouri v. Charles E. Berry*, St. Charles County Circuit Court Cause No. CR190-1201F. The conduct of Hannah in this same conspiracy was the subject of a prior suit in this Court before District Judge Cahill, *Berry v. Hannah*, No. 90-2084-C-4, which was terminated on November 20, 1990 by the dismissal of all felony charges brought against plaintiff Berry by Hannah pursuant to Berry's agreement with Hannah for the dismissal of that suit. Thus Hannah is not now named as a defendant herein.

3. The conduct of all defendants named herein and Hannah before, during and after said prosecution violated and continues to violate plaintiffs Berry's and Gillium's fundamental rights secured by the First, Fourth, Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1983, 1985. The objects of said conspiracy between and among these defendants and Hannah were to punish and humiliate

plaintiffs because of Mr. Berry's race and Ms. Gillium's overt flouting of racial taboos; to incarcerate Mr. Berry; to advance the ecomonic interests and financial ambitions of these defendants by means of inflaming racial bias and animus; to misuse the police powers of the State of Missouri in private lawsuits against plaintiffs; otherwise to deprive plaintiffs of equal protection of the laws and their property by unconstitutional means and abuse of official powers; to pollute the pool of potential jurors in St. Charles County and the State of Missouri against plaintiffs with inflammatory, racially bigoted, officially-sponsored, derogatory and false publicity; and to inflame judicial bias and official attitudes of racial animus against plaintiffs in St. Charles County so much that plaintiffs would be unable to secure a fair trial or even proper pretrial procedures. To a significant, indeed shocking, extent, defendants have been largely successful in their achievement of these purposes, expecially the latter one, although plaintiff Berry, as mentioned in Paragraph 2 *supra*, has been able thus far to frustrate defendants' efforts to incarcerate him. Nevertheless defendants Boggs, Lipp, and Huck and other persons and defendants continue to plot and conspire to contrive grounds on which to seek the further prosecution of Mr. Berry.

Jurisdiction and Venue

4. Jurisdiction rests in this Court pursuant to 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. § 1983, 1985. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b), in that all parties hereto reside in this district and the pertinent facts giving rise to this cause of action occurred in this district.

Claims for Relief

5. The Complaint is brought before the Court pursuant to 42 U.S.C. §§ 1983, 1985 and the First, Fourth, Fifth, Sixth, Seventh,

Eighth and Fourteenth Amendments to the United States Constitution because defendants, and each of them, either acted under color of state law to deprive plaintiffs of their constitutional rights for reasons of racial animus and/or combined and conspired to act in concert to deprive plaintiffs of certain constitutional rights including equal protection of the laws and to damage plaintiffs in their persons and property.

Parties

6. Plaintiff Charles E. Berry a/k/a Chuck Berry (hereinafter referred to as "Berry") is an African-American musician and entertainer of world renown who has a farm and maintains his business office and a second home at Berry Park near the City of Wentzville in St. Charles County, Missouri. He was perhaps the principal founder of the school of music known as rock-'n-roll. The late John Lennon of the Beatles declared that Chuck Berry's name was a synonym for this type of music. Plaintiff Francine Gillium ("Gillium") is a white woman who long has been closely identified with plaintiff Berry. She resides at Berry Park and is the manager of plaintiff Berry's business office at Berry Park. She also was, in the early stages of the conspiracy which is the subject of this Complaint, the owner of a business in the City of Wentzville which formerly operated a restaurant known as The Southern Aire Restaurant which was located in a building owned by plaintiff Berry. That business was totally destroyed and forced to close, and plaintiff Gillium suffered a financial loss of $120,000.00, all as a direct and proximate result of the unlawful conspiracy which is the subject of this Complaint.

7. Defendant Ronald L. Boggs, Esq. ("Boggs") and William J. Hannah, Esq. ("Hannah") were both formerly the elected St. Charles County Prosecuting Attorney. Hannah at all times relevant hereto acted under color of state law and defendant Boggs acted

under color of state law and/or conspired and acted in concert with Hannah and other persons acting under color of state law to deprive plaintiffs of certain of their constitutional rights and conspired directly and indirectly to deny them equal protection of the laws.

(a) Defendant William G. Bowman ("Bowman") at all times relevant hereto was a Deputy Sheriff in the St. Charles County Sheriff's Department and a member of the St. Charles County Multijurisdictional Enforcement Group ("MEG"), a special anti-drug task force composed of law enforcement officers from the St. Charles County Sheriff's Department and certain municipal police forces in St. Charles County.

(b) Defendant Steve Roach ("Roach") at all times relevant hereto was a Deputy Sheriff and a Detective Sergeant in the St. Charles County Sheriff's Department.

(c) Defendant Sharon Oakley ("Oakley") at all times relevant hereto was an employee of the St. Charles County Sheriff, maintained a close relationship with an influential public figure in top ranks of the St. Charles County Courthouse, and was a client of defendant Boggs as a plaintiff in the class-action lawsuit against plaintiff Berry described *infra* Paragraph 33.

(d) Defendant Vincent J. Huck ("Huck" or "Vincent Huck") at all times relevant hereto acted under color of state law as an operative or informant for the MEG, the St. Charles County Sheriff's Department and the St. Charles County Prosecuting Attorney; worked as a paid investigator for defendant Boggs, as well as for defendants Price and Jones; was married to defendant Hosana Huck a/k/a Suzy Huck; and combined and conspired with defendants Boggs, Price, Jones, Hosana Huck, Rich Feagan, Ann Feagan, Bowman, Lipp and Roach and with Hannah and others to

deprive plaintiffs of certain of their constitutional rights including equal protection of the laws.

(e) Defendant Rich Feagan at all times relevant hereto was a former Sheriff's Deputy for the St. Charles County Sheriff, a former investigator for the St. Charles County Prosecuting Attorney when defendant Boggs was the elected Prosecuting Attorney, a paid private investigator for defendant Boggs and other attorneys pursuing litigation in the courts of St. Charles County against plaintiffs Berry and Gillium, a process server in St. Charles County, the husband of defendant Ann Feagan, and combined and conspired directly and indirectly to act in concert with defendants Boggs, Huck and others to deprive plaintiffs of certain constitutional rights including equal protection of the law.

(f) Defendant John E. Price ("Price") at all times relevant hereto employed defendant Vincent Huck as an investigator against plaintiff Berry, represented defendant Hosana Huck along with defendant Jones, pursued litigation as an attorney licensed by the State of Missouri in the courts of St. Charles County against plaintiffs Berry and Gillium, and combined and conspired to act in concert directly and/or indirectly with then-Prosecuting Attorney of St. Charles County Hannah and with defendants Boggs, Jones, Vincent Huck, Hosana Huck, Bowman, Roach, Oakley and Lipp to deprive plaintiffs of certain constitutional rights including equal protection of the laws.

(g) Defendant Thomas F. Jones ("Jones") at all times relevant hereto employed defendant Vincent Huck as an investigator against plaintiff Berry, represented defendant Hosana Huck together with defendant Price, pursued litigation as an attorney licensed by the State of Missouri in the courts of St. Charles County against plaintiffs Berry and Gillium, and

combined and conspired to act in concert directly and/or indirectly with then-Prosecuting Attorney of St. Charles County Hannah and with defendants Boggs, Price, Vincent Huck, Hosana Huck, Bowman, Roach, Oakley and Lipp to deprive plaintiffs of certain constitutional rights including equal protection of the laws.

(h) Defendant Hosana Huck a/k/a Suzy Huck at all times relevant hereto was the wife of defendant Vincent Huck, a client of defendants Price and Jones, pursued litigation in the courts of St. Charles County against plaintiffs Berry and Gillium, and combined and conspired directly and/or indirectly with defendants Jones, Price, Vincent Huck, Boggs, Oakley, Bowman, Roach and with Hannah to deprive plaintiffs of certain constitutional rights including equal protection of the laws.

(i) Defendant Ann Feagan at all times relevant hereto was the wife of defendant Rich Feagan, a client of defendant Boggs as a plaintiff in a class-action lawsuit, *see infra* Paragraph 33, against plaintiff Berry, and combined and conspired directly and/or indirectly to act in concert with defendants Rich Feagan, Boggs, Vincent Huck, Oakley, Bowman, Roach and with Hannah to deprive plaintiffs of certain constitutional rights including equal protection of the laws.

(j) Defendant Tammy M. Lipp at all times relevant hereto was a client of defendant Boggs as a plaintiff in the class-action lawsuit against plaintiff Berry, and combined and conspired directly and/or indirectly to act in concert with defendants Roach, Jones, Price, Boggs, Vincent Huck and with Hannah to deprive plaintiffs of certain constitutional rights including equal protection of the laws.

8. All defendants herein acted at all times relevant here as

agents of each other, and all defendants conspired directly or indirectly with one another and with Hannah or his agents or with persons acting under color of state law to deprive plaintiffs of the equal protection of the laws and of other constitutional rights.

9. In conjunction with the St. Charles County Sheriff and the St. Charles County Prosecuting Attorney the MEG participated in a massive and prolonged raid upon and search of Berry Park and the seizure of plaintiffs' papers, personal effects, currency and property on June 23, 1990. *See* Paragraph 31 *infra*.

10. The precise identities and/or precise roles of all 200 defendant Does are presently unknown to plaintiffs. Defendants Does I through XX are officers, agents, officials or employees of St. Charles County, either with the County Prosecuting Attorney, the County Sheriff, or the County Circuit Court. Does XXI through XXX are other employees of St. Charles County. Does XXXI through XL are officers, agents or employees of certain municipal police forces in St. Charles County. Does XLI through XLIX are other employees or officials of certain municipalities in St. Charles County. Does L through LIX are members, agents or employees of MEG. Does LX through LXIX are informants and operative of the MEG who acted under color of state law. Does LXX through LXXIX are other persons acting under color of state law who combined and conspired to act in concert with Hannah and defendant Boggs, Jones, Price, Vincent Huck, Bowman, Oakley, and Roach in the planning for and execution of the June 23, 1990 raid upon Berry Park and/or in planning, preparing, obtaining and/or arranging for the issuance of the falsely contrived affidavit which purported to authorize that raid. Does LXXX through LXXXIX are persons who either acted under color of state law or combined and conspired to act in concert with persons acting under color of state law to publicize the above-mentioned raid or to

distort publicly its results and import or otherwise to malign, disparage and denigrate plaintiff Berry. Does C through CLXXXIX are members of the putative class on whose behalf the proposed class against plaintiff Berry, *see* Paragraph 33 *infra*, is brought or their attorneys or other persons working in concert with them to deprive plaintiff Berry of equal protection of the laws and other constitutional rights and to damage him in his property, by proceeding to assert claims without merit in a courthouse inflamed with racial animus as set forth *supra* and *infra*. Does XCC through CC are persons who otherwise combined and conspired to act in concert to deprive plaintiffs of equal protection and certain other constitutional rights. All Doe defendants either acted under color of state law or combined and conspired to deprive plaintiffs of equal protection and certain other of their constitutional rights.

## FACTS GIVING RISE TO CAUSE OF ACTION

11. For at least five years prior to 1990 defendant Vincent Huck worked as an operative or informer for the MEG, the St. Charles County Sheriff's Department, and the U.S. Drug Enforcement Administration ("DEA") and during the course of those duties accepted jobs from plaintiffs Berry and Gillium at Berry Park and pretended to be a construction worker at Berry Park while he surveilled plaintiff Berry in the hope of reaping a windfall from the government agencies he reported to for the seizure of illegal drugs he hoped to find at Berry Park. In fact, there were no drugs at Berry Park because plaintiffs did and do abhor their use.

12. Nevertheless defendant Huck was obsessed with a delusional belief, based on plaintiff Berry's race, public prominence and artistic success, that plaintiffs kept and trafficked in major quantities of cocaine and other illegal drugs at and from Berry Park. Defendant Huck communicated those delusional

beliefs to and inspired feelings of racial animus among Hannah and defendants Boggs, Jones, Price, Oakley, Bowman, Roach and others including but not limited to certain of the Doe defendants and other defendants herein.

13. In the course of his role as an undercover operative or informer defendant Vincent Huck committed, participated in and/or directed several illegal searches of private, locked buildings or residences at Berry Park which were tantamount to officially-sanctioned burglary. In committing those burglaries Mr. Huck acted in conspiracy with and under the direction of defendants Boggs, Price, and/or Jones and under a *de facto* grant of immunity from prosecution for burglary and other criminal acts by Hannah, defendant Bowman and other St. Charles County law enforcement and prosecutorial officials.

14. During said burglaries defendant Vincent Huck searched through plaintiffs' personal effects and private business papers and records. While conducting such searches Mr. Huck seized personal and confidential records, mementoes, and other personal property from plaintiffs, but was never able to find any illegal drugs at Berry Park.

15. Defendant Vincent Huck shared the results of these unauthorized seizures with defendants Boggs, Price, Jones and Rich Feagan who thereupon embarked upon a concerted plan to deprive plaintiffs of the equal protection of the laws and a number of coordinated efforts to enrich themselves at the expense of plaintiffs by inflaming racial animus toward plaintiff Berry as a man of color and high public visibility.

16. Presumably the last such officially-sanctioned burglary and illegal search and seizure carried out by defendant Vincent

Huck apparently occurred on or about September 10, 1989 at Berry Park. Mr. Huck at or before that time committed larceny of numerous private videotape and photographs made by or depicting plaintiffs as well as certain videotapes which had been made by defendant Huck and others at The Southern Aire Restaurant.

17. The private photographs which were burglarized by Huck also included, *inter alia*, some which displayed plaintiff Berry, an African-American, standing next to various, unidentified white women of legal age in a state of complete frontal nudity. All these were confidential Polaroid snapshots taken by plaintiff Berry over the course of many years to protect himself against possible future claims.

18. On or about September 28, 1989 defendant Vincent Huck and other persons sold said stolen photographs to Drake Publishers, Inc., publisher of the pornographic High Society magazine. Said photos were sold by Huck and others to Drake Publishers in New York City pursuant to a written agreement for $15,000.00 cash.

19. Defendant Vincent Huck during said burglaries also had "seized" under color of state law while acting for Hannah and defendants Bowman, Oakley, and Roach certain personal videotapes of plaintiff Berry which Hannah and these defendants permitted Mr. Huck to convert to his own use and to share with defendants Boggs, Price and Jones. Defendants Huck and Boggs thereupon entered into illicit negotiations with video distributors, writers and publishers in Western Europe and throughout the United States in an effort to capitalize upon Mr. Berry's stature as a world-class entertainer. Defendants Price and Jones meanwhile conspired with defendants Vincent Huck, Hosana Huck, Boggs and other persons to deprive plaintiff Berry of the equal protection

of the laws by agreeing to blackmail him under threat of filing lawsuits and seeking his criminal prosecution on legally spurious but racially inflammatory charges.

20. Simultaneously defendant Vincent Huck arranged with codefendant Hosana Huck and defendants Price and Jones for these latter defendants to represent his wife as attorneys in a blackmail attempt, *see* Paragraph 23 *infra*, against plaintiffs. That claim was based upon allegations that codefendant Hosana Huck has been videotaped while using the restroom at The Southern Aire Restaurant, owned and operated by plaintiff Gillium but not actively managed by her. In fact, during part of the period that codefendant Hosana Huck worked as a cook at The Southern Aire, persons other than plaintiffs Berry and Gillium had engaged in some surveillance, by videotape and otherwise, of employees using the restroom facilities to combat complaints of marijuana usage by restaurant employees. Also defendant Vincent Huck had access as a pretensive construction worker to certain private areas of The Southern Aire from which such videotape surveillance was conducted.

21. Defendants Vincent Huck, Price and Jones and others proposed to blackmail plaintiffs by selling to plaintiff Berry for $10 million, as an ostensible settlement of the alleged damages of codefendant Hosana Huck, both the videotapes illegally seized by defendant Vincent Huck while acting under color of state law in burglarizing various buildings at Berry Park and videotapes allegedly depicting Hosana Huck and others in the restrooms of The Southern Aire made by defendant Vincent Huck himself while acting under color of state law and/or other persons pursuant to the conspiracy described above in Paragraphs 2-3, 5 and 7-10.

22. Plaintiff Berry refused to pay to all or any of defendants

the sum of $10 million or, indeed, any sum at all for blackmail or any videotapes stolen from him under color of state law or made by defendant Vincent Huck or any other person. Defendants Jones, Price, Vincent Huck and Hosana Huck thereupon began to conspire among themselves and with others to deny plaintiffs equal protection of the law by damaging them in their personal reputations and property.

23. Acting in concert to deny plaintiffs their constitutional rights, including equal protection of the laws, and to damage them in their persons and property, defendants Jones and Price and defendant Vincent Huck as a "legal investigator" and defendant Hosana Huck agreed and arranged among themselves and with others to capitalize upon plaintiff Berry's celebrity with lurid allegations of inter-racial sexual peeping and other inter-racial sexual titillation, and pursuant to that agreement on or about December 26, 1989 filed in the Circuit Court of St. Charles County with great fanfare and amid maliciously-generated extreme publicity a lawsuit styled *Hosana Huck et al. v. Charles Berry,* No. CV189-7019, based at least in part upon videotapes stolen from Berry Park by defendant Vincent Huck acting under color of state law.

24. Defendant Vincent Huck since has falsely testified under oath that he "found" said videotapes in a trash bin full of garbage behind The Southern Aire Restaurant, and that supposedly he went there to conduct that search in response to an anonymous telephone "tip". In truth, as set forth above and below, defendants Huck, Jones, Price, and Hosana Huck acting in conjunction with defendants Boggs and Rich Feagan, and through them with the other defendants, arranged, conspired, and contrived to prepare said suit and file it and otherwise to influence the public, the media, and especially to inflame and prejudice with racial animus and bias the public authorities and court system of St. Charles County with

lurid, racially oriented sex-scandal allegations focused upon the prominence of plaintiff Berry as an African-American of international stature and the "white" ancestry of the women allegedly videotaped by him at The Southern Aire Restaurant.

25. As a direct and proximate result of the filing of said civil lawsuit in St. Charles County, the aforesaid wrongful conspiracy among and actions of said defendants, and the inflamed racial climate in St. Charles County, plaintiff Francine Gillium was forced to close The Southern Aire Restaurant and to terminate all its operations within a few days. She thereby incurred a loss of approximately $120,000 as the owner-operator of The Southern Aire. Plaintiff Berry was proximately damaged in his property as a direct and proximate result of this aspect of the illegal conspiracy among defendants because he, as the owner of the building in which The Southern Aire Restaurant had operated, thus lost a valuable, rent-paying commercial tenant. Further, because of the inflamed racial climate in and around the City of Wentzville, he has been unable for more than one (1) year to located another tenant for the building, and same remains vacant up till the date this suit is filed, all to his damage in an amount of not less than $50,000.

26. During the spring of 1990 defendants Price, Jones and Huck conspired among themselves to deprive plaintiff Berry of the equal protection of the laws by arranging to procure perjured testimony against him and to arrange for his prosecution if at all possible. Defendants Price and Jones conspired with defendant Huck for Huck to plant or conceal illegal drugs at Berry Park to implicate plaintiffs in the event they could arrange for an official search of Berry Park. These defendants conspired with defendant Boggs, and through him with then-Prosecuting Attorney Hannah and defendants Rich Feagan, Bowman, Oakley and Roach to have Berry Park searched, *supra* Paragraph 9 and *infra* paragraph 28, to

have plaintiff Berry prosecuted on whatever charges defendants and Hannah could conjure up against him, and to make plaintiffs the victims of an all-out publicity assault by Hannah and other public officials and of a campaign or series of arbitrary decisions of the judiciary of St. Charles County in private litigation between plaintiffs and many of defendants herein. *See*, for example, Paragraphs 23 *supra* and 33 *infra*. Pursuant to his agreement with defendants Price and Jones defendant Huck proceeded to plant a quantity of a controlled substance, to wit, marijuana in an amount sufficient to constitute a felony under Missouri law. *See* Paragraph 39 *infra*.

27. In furtherance of their conspiracy and to assist Vincent Huck and defendants Hosana Huck, Ann Feagan, Oakley and Lipp in their claims against plaintiffs, at Hannah's request on June 23, 1990 a search warrant was issued by the St. Charles County Circuit Court to allow the MEG and other police authorities to search Mr. Berry's living quarters, offices, studio and other structures located at Berry Park in Wentzville, Missouri. The basis for said search warrant was an outrageously false and exaggerated affidavit sworn out by defendant William G. Bowman a Sheriff's Deputy in St. Charles County. Said affidavit detailed the incredible exploits and claims of one supposedly "reliable, confidential informant", who was defendant Vincent Huck and who had obvious, readily apparent and well-known motives to disparage, defame and denigrate Mr. Berry because of the pending civil suit described above. Further, it is apparent that the search warrant affidavit was so lacking in indicia of probable cause as to render belief in its *bona fides* unreasonable, thus calling into question the commitment of the St. Charles County Circuit Court to protect the civil rights of plaintiffs, as well as its interest in so doing.

28. It is evident from the search warrant affidavit that Vincent

*Appendix A*

Huck had been an informant for St. Charles County authorities dating back to at least December 1988. At various times from December 1988 to June 1990, according to the search warrant affidavit, Vincent Huck made absurdly false allegations to the DEA and St. Charles County authorities regarding purported cocaine "trafficking" by Mr. Berry.

(a) For example, the search warrant affidavit falsely stated, based upon information from Vincent Huck, that a certain female "delivers large quantities of cocaine to Charles 'Chuck' BERRY". Further, the affidavit, again based upon information from Vincent Huck, stated that Mr. Berry is "always in possession of large quantities of cocaine".

(b) The affidavit also stated with no valid basis, that, according to confidential informer Huck, on March 12, 1989 Mr. Berry supposedly was to have returned to St. Louis via Lambert Airport "with cocaine secreted in his baggage of [sic] his guitar case . . .". However, upon search of the "suitcase and guitar case it was determined there was no cocaine of [sic] any quantity present".

(c) Finally, the affidavit irresponsibly state that, according to Huck, on June 20, 1990 Mr. Berry supposedly returned to St. Louis via Lambert Airport with a "large amount of cocaine" which supposedly was being stored on Mr. Berry's property.

(d) Said affidavit and informant at all relevant times were inherently incredible, and there was no credible basis for any accusations against Mr. Berry or for a search of Berry Park.

29. In fact, plaintiff Berry did not then or ever transport any cocaine nor did he store same on his property. A subsequent search

of Mr. Berry's personal quarters, offices, studio and other structures at Berry Park conducted during the course of nearly a full day by a large search party revealed that no cocaine was present.

30. Said bogus search warrant affidavit also revealed that the "reliable confidential informant", defendant Vincent Huck, had provided three VHS videocassette tapes to the St. Charles County Sheriff's Department. Said videotapes were seized and stolen by Vincent Huck on or before September 9, 1989 from Berry Park, and Vincent Huck was then acting in concert with Hannah and defendants. The Huck burglary/seizure was undertaken in the course of an officially-sponsored prosecutorial investigation of Mr. Berry under the direction of Hannah with inspiration, advice and encouragement from defendants Bowman, Roach, Oakley, Boggs, Price, Jones and Rich Feagan. Said tapes, to the extent they were not made by defendant Huck or his co-conspirators, were seized by defendant Huck without a valid search warrant and concomitantly their search and seizure violated plaintiff Berry's rights under the Fourth and Fourteenth Amendments to the United States Constitution.

31. On or about June 23, 1990 the St. Charles County Multijurisdictional Enforcement Group "raided" the Berry Park complex in Wentzville, Missouri. The search and seizure took place without Mr. Berry's knowledge or consent, without the consent of plaintiff Gillium, and at a time when Mr. Berry was not present at Berry Park. In the course of that search the MEG and its accompanists caused extensive damage to the walls of certain structures at Berry Park. Among other items, the St. Charles County authorities seized various pieces of Mr. Berry's personal property including currency totalling $123,000.00, of which $122,501.00 was eventually returned and $499,00 was kept by

unknown persons. Even though Hannah had no legitimate reason to seize, much less continue to hold that cash, defendants Bowman, Roach, Oakley and he along with some of the defendants Does refused continuously to return it to plaintiff Berry, thereby taking his property without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. Rather, Hannah and defendant Bowman turned it over to federal authorities after he could no longer justify holding it. Said currency was not finally returned to Mr. Berry until on or after September 25, 1990 when the United States Attorney for the Eastern District of Missouri declined to "file a forfeiture complaint". At that point the sum of $499.00 was missing and never has been found or replaced. Further, plaintiff Berry lost the use of those funds and interest on them. Despite the irresponsible and patently incredible allegations from Vincent Huck in the search warrant affidavit, the St. Charles County authorities found absolutely no cocaine on Mr. Berry's property nor did they find any evidence that he was ever engaged in cocaine trafficking.

32. On or about June 27, 1990 City of St. Peters in St. Charles County Police Chief Ronald Neubauer disseminated to the press the details of said "raid", despite the fact that no charges had been filed against Mr. Berry up to that time. The St. Charles County authorities advised to the press that they had found a "supply of narcotics" and that so-called "drug records" were seized from Mr. Berry's property. Further, the St. Charles County authorities made specific reference to claims (already known to be false) that Mr. Berry was involved in trafficking "multi-kilogram quantities of cocaine". Said allegations were disseminated to the mass media in a press conference without any privilege, were not a necessary incident of any police or prosecutorial function, and were made solely for the purposes of defaming plaintiff Berry and inflaming the population and judiciary of St. Charles County against him and

plaintiff Gillium inasmuch as no cocaine of any quantity had been found on his property in the course of the "raid".

33. On the same day that St. Peters Police Chief Neubauer conducted his press conference relating to the "raid" on Berry Park, a class-action lawsuit was filed in the St. Charles County Circuit Court by various "Doe" plaintiffs against Mr. Berry. *See Crawford, et al. v. Charles Berry, et al.*, No. CV190-3667 (St. Charles County Circuit Court, State of Missouri). (The "Representative Parties" or "class action" or "putative class action" hereinafter). That putative class-action civil suit alleged that plaintiff Berry purportedly filmed unidentified plaintiffs with a videotape camera while they were using the bathroom facilities at The Southern Air Restaurant or at Berry's farm known as Berry Park. Both locations are in St. Charles County, Missouri. The attorney for the "Representative plaintiffs" in the putative class-action suit, defendant Ronald L. Boggs, was formerly the elected Prosecuting Attorney of St. Charles County, was a central conspirator between and among all the defendants herein, and was remains an influential figure in St. Charles County politics. Also he was at all times relevant hereto the personal attorney for defendants Vincent Huck, Sharon Oakley, Ann Feagan, Rich Feagan and Tammy M. Lipp, and defendant Vincent Huck acted and acts as his paralegal and legal investigator. The "raid" on plaintiff Berry's property and the subsequent press conferences mentioned above and below were carefully coordinated by the St. Charles County authorities with the filing of the class-action civil suit against plaintiff Berry. Further, the below-described criminal proceedings against plaintiff Berry, now dismissed (*see* Paragraphs 21 *supra* and 39 *infra*), were initiated, brought and maintained pursuant to an agreement or agreements between and among defendants herein and Hannah to deprive plaintiffs Berry and Gillium of their constitutional rights to due process of law, equal protection of the laws, their personal liberty and their

property, and to advance private civil litigation in which all defendants had a direct racial, financial, political and/or personal bigotry interest.

34. The day after the class-action civil suit was filed against Mr. Berry amid great publicity, on June 28, 1990, Hannah called a press conference at his St. Charles County Prosecuting Attorney's office. In that press conference, Hannah gave an "account" of the "raid" on Mr. Berry's property. At that news conference Hannah related that the authorities were "looking for" cocaine on Mr. Berry's property: "cocaine was of course one of the major items we were looking for, and yes, as in many times when you conduct a search, you don't find everything that is listed in your affidavit". By this statement Hannah sought to create the false impression that plaintiffs dealt in and kept cocaine, but had successfully eluded the MEG's search for same.

35. Further, at the news conference, Hannah stated that "Berry is involved in cocaine trafficking, earning millions a year bringing drugs to St. Louis in his guitar case". Hannah then released to the press the bogus search warrant affidavit from defendants Bowman, Roach and Vincent Huck already known by all defendants and hannah to be false, baseless and malicious. In so doing, defendants and Hannah disseminated to mass media around the United States and in several foreign countries the spurious allegations described above in Paragraph 28. At the press conference Hannah then discussed various portions of said affidavit. Specifically, Hannah as agent and conspirator of, with, for and among defendants made reference to allegations that Mr. Berry was engaged in "drug [cocaine] trafficking". By another report of Hannah news conference, unnamed St. Charles County authorities, i.e., defendant Roach and/or Hannah, claimed they had seized "pornographic tapes" which allegedly displayed underaged

women "using" the restroom. These statements and those described in Paragraphs 32, 34 *supra* and Paragraph 36 *infra* deprived Mr. Berry of due process of law and denied him and plaintiff Gillium equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

36. The statements made by Hannah at his news conference, by his own admissions, were made even before a decision was made about issuing any charges against Mr. Berry, i.e., at a time when the case was "being reviewed" by Hannah. These statements made by defendants through Hannah, as outlined above, were defamatory, unprivileged, and maliciously uttered for the purpose of harming Mr. Berry and plaintiff Gillium by rendering them unable to obtain a fair trial (through falsely associating the plaintiffs with the use, possession, and trafficking of cocaine and child pornography) on the various civil claims by or against them and potential criminal charges.

37. Co-conspirator Hannah held said news conference for the purposes, *inter alia*, of depriving plaintiffs of equal protection and due process and assisting defendants herein with the prosecution of their suits and claims against plaintiffs.

38. On July 15, 1990 the St. Louis Post-Dispatch ran an editorial severely criticizing Hannah's handling of the "raid" and his prejudicially defamatory news conference regarding plaintiff Berry. The editorial noted that Hannah was "quick to call a news conference, even though no cocaine was found" at Berry Park. The news conference by Hannah and the news leaks described in Paragraph 35 *supra* were coordinated with the filing of the class-action lawsuit to advance the conspiracy which is the subject of this case. They served no *bona fide* prosecutorial role or function.

39. Four days after the critical editorial in the *St. Louis Post-*

*Dispatch* was published, and to assist defendants in their civil suits and claims against plaintiffs by polluting the jury pool and poisoning the mind of the entire St. Charles County judiciary, Hannah on July 19, 1990 filed criminal charges against Mr. Berry. These charges included one felony count for alleged possession of over 35 grams of marijuana, *see* Paragraph 26 *supra*, and three felony counts of purported "child abuse". Hannah and all defendants herein had then and still possess significant racial, personal, financial and political interests in initiating and continuing the baseless prosecution of plaintiff Berry, and the issuance of said criminal charges was the direct result and product of illegal conspiracy among and between Hannah and defendants Bowman, Roach, Oakley, Boggs, Price, Jones, Vincent Huck, Rich Feagan and Lipp and, in turn, between these defendants as agents and/or attorneys for or co-conspirators with the remaining defendants.

40. The "child abuse" charges, alleged to have risen under RSMo. § 568.060, asserted that plaintiff Berry was guilty of photographing or filming children less than seventeen years old "engaging in a prohibited sexual act. . . ". The Missouri statute defines a "prohibited sexual act" as "nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction". *Id.* The charges against Mr. Berry under this statute violated his First Amendment freedoms and were unconstitutional as applied to plaintiff in these circumstances. Further, the meritless "child abuse" charges were based upon videotapes seized or stolen by Vincent Huck acting at the direction of Hannah and defendants Bowman, Boggs, Jones and Price as described in Paragraphs 13-16, 19 above, and not during the June 23 "raid", and actions taken by them and Hannah and defendants Roach, Lipp, Boggs and Vincent Huck in furtherance of the conspiracy described above.

41. It is apparent that Hannah initiated the criminal investigation of plaintiff Berry, conducted the June 23 "raid" upon Mr. Berry's Berry Park complex, and held his aforementioned June 28, 1990 press conference for racial motives and for the purpose of helping his informer defendant Vincent Huck and all these defendants in the civil suits mentioned above. The entire prosecution of plaintiff Berry by Hannah was brought in bad faith and irretrievably violated plaintiff Berry's constitutional rights and deprived him and plaintiff Gillium of equal protection of the laws and of any chance of receiving fair trials in the various civil suits between plaintiffs and certain of defendants in the courts of St. Charles County specifically and the State of Missouri generally.

42. In early July of 1990 St. Charles County Assistant Prosecuting Attorney John Zimmerman, the prosecutor who worked with defendants Bowman, Roach, Oakley, Boggs Vincent Huck and Lipp to build a criminal case against plaintiff Berry, said in reference to plaintiff Berry, "One way or another we are going to get that nigger". This statement by the lead trial counsel from Hannah's office on the Berry criminal prosecution made manifest that the criminal prosecution of plaintiff Berry was not undertaken in good-faith but was rather motivated by racial bias and prejudice and the aforesaid conspiracy, accordingly, violated plaintiff Berry's right to equal protection due process as guaranteed by the Fourteenth Amendment to the United States Constitution.

43. On or about September 26, 1990, three full months after the illegal search and seizure of plaintiff Berry's property, the United States Attorney finally decided to return to plaintiff Berry $122,501.00 of the $123,000.00 in United States currency seized by the St. Charles County authorities. This substantial sum of money was, first, taken and held by Hannah in concert with other St. Charles County public authorities named as defendants herein

and unnamed, and, later, turned over to federal authorities for the purpose of attempting to cripple, or to hamper plaintiff Berry financially in his defense of the criminal charges and the above-mentioned civil cases against him in violation of his rights under the Sixth, Seventh and Fourteenth Amendments.

44. The prosecution of plaintiff Berry by Hannah and the defendant St. Charles County officials at the behest of defendants Boggs, Price, Jones and Vincent until the filing of the case before Judge Cahill in this Court known as *Berry v. Hannah, see* Paragraphs 2, 39-40 *supra,* blatantly violated the Fourth and Fourteenth Amendments to the United States Constitution in that Hannah and defendants Bowman, Roach and Oakley and a Judge in St. Charles County (a) obtained and issued the search warrant, in reliance upon an affidavit containing patently false statements from a so-called "confidential informant", defendant Vincent Huck, who had been shown in the past to be extremely unreliable and motivated by private animus against plaintiff Berry and who obviously was lying in an effort to promote his and all defendants' interests in civil litigation against plaintiff Berry; and (b) Hannah thereafter consciously publicized the search warrant after he necessarily knew it and defendant Bowman's affidavit and defendant Huck's supporting information were false. All St. Charles County prosecuting authorities and court officials, including Hannah, had already learned, if they did not know all along, the true facts which demonstrated that Vincent Huck was not a reliable informant, but they continued in bad faith to pursue and to permit prosecution of plaintiff Berry pursuant to the conspiracy described above.

45. Hannah's public statements pursuant to said conspiracy linking plaintiff Berry to alleged "cocaine trafficking", made during Hannah's press conference at his office in St. Charles, when

no credible evidence existed to support such an extravagant claim against an African-American of great celebrity and when, in fact, no such criminal charges were levied against Mr. Berry, clearly establish official and racial bias and prejudice against Mr. Berry and advanced the conspiracy among and interests of defendants here.

46. Further, said reckless and unsupported statements by Hannah about plaintiff Berry were made for the purpose of defaming Mr. Berry, and were made completely outside the scope of Hannah's prosecutorial authority. In addition, the conscious efforts of Hannah to release conspicuously to the press the bogus search warrant affidavit, already known by him to be false, which contained the aforementioned defamatory falsehoods about Mr. Berry was a violation of plaintiff's constitutional rights by one acting under color of state law.

47. The prosecution of plaintiff Berry caused him and co-plaintiff Gillium great and immediate irreparable injury, including, but not limited to, infringement upon their Seventh and Fourteenth Amendment rights to due process of law and a free, impartial and fair jury trial in the defense of the aforementioned civil cases against them and in Mr. Berry's prosecution of his civil case against defendants Jones and Hosana Huck. Further, it placed Mr. Berry in jeopardy of an unconstitutional incarceration since the Missouri Supreme Court then and now interprets RSMo. §§ 568.060 *et seq.* in a literal and overbroad fashion without applying the constitutional gloss or constraints on its interpretation needed to make some pass constitutional muster under the First and Fourteenth Amendments. Not least, the prosecution of plaintiff Berry had and continues to have the effect of denying them equal protection of the laws by subjecting plaintiffs Berry and Gillium to numerous arbitrary, unfair, hostile and unconstitutional, rulings by

the judiciary of St. Charles County in plaintiffs' defense and conduct of the aforementioned civil cases, including but not limited to harsh and unjust decisions by judges who share the highest degree of consanguinity with lawyers possessing a financial interest in the aforementioned civil suits against plaintiffs and/or in similar litigation. Said rulings have deprived plaintiffs of equal protection, due process of law and other rights protected by the First, Seventh and Fourteenth Amendments to the Constitution.

48. As a direct and proximate result of the aforesaid unlawful conspiracy by and among defendants and Hannah, plaintiffs Berry and Gillium have suffered the aforesaid monetary losses and plaintiff Berry lost a guest appearance before an enormous national television audience on the "Tonight Show" on the NBC network. Further, plaintiffs have sustained and will continue to suffer incalculable losses for which they have no adequate remedy at law as the aforesaid civil suits against them are prosecuted and new, similar cases against them are filed as part of the aforesaid conspiracy and/or in its wake, in circumstances where plaintiffs have been and are denied, and cannot enforce in the courts where said actions are brought, their civil rights including their right to equal protection of the laws by defendants and persons acting with them. All judges in St. Charles County were and are elected in partisan elections, as is the chief administrator of that Circuit Court. The politics of St. Charles County is dominated by two lily-white machines. Those machines control all jobs within or related to the St. Charles County judiciary. On information and belief, no person of color has ever held any political office there. Within living memory no African-American has ever been elected to, or served on, either the Republican or the Democrat County Central Committee. These Committees play a crucial role, *inter alia*, in the allocation of courthouse jobs as part of a political patronage system.

49. Defendants' aforesaid conspiracy to violate the civil rights of plaintiffs and their above-described actions in furtherance of same were and are intentional, malicious and willfully done in bad faith for unconstitutional motives and by unconstitutional means in violation of the civil rights of plaintiffs and contrary to 28 U.S.C. §§ 1983, 1985 and otherwise.

WHEREFORE, plaintiffs Charles E. Berry and Francine Gillium move this Honorable Court for the following relief:

(1) To enjoin defendants, and each of them from taking any further actions in furtherance of the aforesaid conspiracy, including but not limited to barring them from further prosecution of, or otherwise taking any measures, actions or steps to the prejudice of plaintiff Berry and/or plaintiff Gillium in the following cases now pending in the Circuit Court of St. Charles County, Missouri:

(a) *Representative Parties (Crawford et al.) v. Berry et al.*, Nos. CV190-3667CC and CV190-5925CC

(b) *Huck et al. v. Berry et al.*, No. CV189-7019CC

(c) *Jones, Hosana Huck & McKinley v. Berry and Huck*, No. CV190-2537CC; and

(2) To declare that the "raid" on Berry Park by the St. Charles County Sheriff and the MEG on June 23, 1990; and the subsequent filing of baseless criminal charges by the Prosecuting Attorney of St. Charles County against plaintiff Berry; and all related acts performed by or at the request of some or all of these defendants were

motivated by racial animus and have made it impossible in a practical sense for plaintiffs to protect and enjoy the full measure of their constitutional rights in the courts of St. Charles County and the State of Missouri; and

(3) To declare that the Missouri law on punitive damages awards in civil cases under which certain of the defendants and other persons asserting similar claims seek to proceed against plaintiffs is constitutionally defective as to plaintiffs Berry and Gillium under the guarantees of the Fifth, Eighth and Fourteenth Amendments; and

(4) To declare that, because plaintiffs Berry and Gillium constitute a suspect classification for equal protection analysis and for other good reasons, the Missouri laws of torts under which certain of these defendants seek to recover against plaintiffs are unconstitutional as applied to these plaintiffs for the reasons, *inter alia*, that they lack sufficient certainty as to the availability of the statutory employer defense provided by Chapter 287 of the Missouri Revised Statutes and thereby deny plaintiffs equal protection and are overly broad and so unduly vague as to create an arbitrary classification and/or to lack sufficient rational foundation as applied to these plaintiffs; and

(5) To award plaintiff Gillium compensatory damages against defendants, and each of them, in the amount of ONE HUNDRED TWENTY THOUSAND ($120,000.00) DOLLARS, together with prejudgment interest and her reasonable costs and expenses in this action, including attorneys' fees; and

(6) To award plaintiff Berry compensatory damages against defendants, and each of them, in an amount that will fairly and justly compensate him for this damages and losses sustained as a direct result of defendants' aforesaid conspiracy, including the costs of and legal fees incurred in his criminal defense of the now-dismissed charges filed against him in the Circuit Court of St. Charles County by Hannah, as aforesaid; the costs of and legal fees incurred in his prosecution of *Berry v. Hannah* filed in this Court, No. 90-2084-C-4; and the loss of use of his funds in the amount of $123,000.00 from June 23, 1990 until September 26, 1990; together with prejudgment interest and his reasonable costs in this action, including attorneys' fees; and

(7) Such other relief as the Court may deem just and proper.

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